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ABSTRACT

The seven chapters in this monograph were written to provide the student affairs professional with one professional resource among the many that are necessary to understand the legal aspects of professional responsibility in this area. "Risk Management and Professional Responsibility" (Hilda F. Owens) identifies some elements of professional responsibility and stresses the importance of individual and institutional risk management plans. "The Student/Institutional Relationship: A Legal Update" (D. Parker Young) provides a legal update on matters relating to the student/institution relationship. "The Chief Student Affairs Officer as Employer and Manager: A Special Risk" (Patricia A. Hollander) brings an attorney's experience to the issues of importance to chief student affairs officers in their roles as employers and managers. "The Residential Campus: High-Risk Territory!" (John H. Schuh) discusses issues of special concern to practitioners on a residential campus and offers suggestions for managing those special risks. "Rights of Association, Expression, and Publication" (Daniel R. Walbolt) addresses the importance of recognizing and honoring those rights as programs and services are planned and rendered. "Risk Management in Campus Activities Programming" (Richard Bredemeier) treats the legal, political, and philosophical risks associated with risk management in campus activities programming. "To Risk or Not to Risk: That is the Question" (Edward H. Hammond) reminds the practitioner that there is no way to remove all risk from the education arena, summarizes some basic legal responsibilities, and discusses the development of a risk management plan. (NB)

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Risk Management and the Student Affairs Professional

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FOREWORD

The title of this monograph, *Risk Management and the Student Affairs Professional*, indicates the increasing sophistication of student affairs professionals in recognizing and treating legal liability risks in a preventive, as opposed to a remedial, fashion.

Only a decade ago, student affairs professionals were unable to plan meaningful risk management strategies. At that time, the body of case law, statutes, and regulations was still relatively unformed and shapeless. When one compares the legal casebooks and textbooks on college law published in the late 60's and early 70's with similar works published in the last several years, it becomes apparent that the body of law affecting the work of the student personnel professional has undergone significant growth and development.

Concurrent with that growth was an effort on behalf of professional associations to bring the best management practices from other disciplines and fields to the legal aspects of the student affairs work. The concept of risk management first appeared in the higher education literature in the mid 1970's. This writer introduced risk management concepts to the National Association of Student Personnel Administrators (NASPA) at the 1976 National Conference. Dr. Edward H. Hammond, NASPA President for 1983-84 and a contributor to this monograph, has done much to educate the profession regarding the concept of risk management through presentations at professional meetings, articles, and consulting work.

The relatively mature state of the law of student personnel work and the general appreciation of the importance of managing legal liability through a preventive risk analysis process creates yet another professional obligation and standard for the profession. Our institutions' boards, presidents, faculty, colleagues, and students have every reason to expect us to know the law, to minimize legal risks, and to manage institutional resources toward that end. For us as working professionals to fail in this capacity is to invite, in addition to professional disrespect, the possibility of liability for negligence.

The information in this monograph can be an important managerial prophylactic, shielding both our institutions and ourselves from adverse consequences. It is hoped that this monograph will make more easily accessible those legal and risk management concepts which are of use and benefit to the profession and the institutions we serve.

E. T. "Joe" Buchanan, III
NASPA President, 1981-82

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Information presented in this monograph is provided for general information and consideration and is not provided as legal advice. The editor encourages the reader to seek the advice of an attorney regarding questions about specific situations at particular institutions and in given states.

PREFACE

Constitutional principles and contract law are having increased application to relationships on college and university campuses. The increased willingness of students, employees, and other parties to hold educators legally accountable for decisions and actions necessitate that student affairs professionals have a basic knowledge of legal issues, liability, and risk management. A knowledge of where educational activity and legal principles interface is vital in order for student affairs professionals to assume their various responsibilities with the desired level of competence and confidence. An expanded knowledge and increased sensitivity to considering legal guidelines for a particular action and appropriate access to legal counsel when it is needed, should help insure that educational services are provided in a manner that minimizes the risk of liability for both student affairs professionals and their institutions.

Today's practitioners are working in an entirely different educational arena from that of their predecessors of twenty-five years ago. Liking students and having one's heart in the right place are important for success as a student affairs administrator, but successful practitioners also know that they must be cognizant of but not paralyzed by their legal parameters. For the purpose of contributing to the knowledge and competence of

student affairs professionals in this important area of their professional responsibility, this monograph was conceived and is presented by the National Association of Student Personnel Administrators.

In Chapter One, Owens sets the stage for consideration of risk management for the student affairs professional by identifying some elements of professional responsibility and stressing the importance of individual and institutional risk management plans. Young, in Chapter Two, provides a legal update on matters relating to the student/institution relationship, and in Chapter Three, Hollander brings her experience as an attorney to the issues of importance to chief student affairs officers in their roles as employers and managers.

Schuh, in Chapter Four, discusses issues of special concern to practitioners on a residential campus and offers suggestions for managing those special risks. With the perspective of a chief student affairs officer and an attorney, Walbolt addresses, in Chapter Five, the importance of recognizing and honoring the rights of association, expression, and publication as programs and services are planned and rendered.

Bredemeier, in Chapter Six, treats the legal, political, and philosophical risks associated with risk management in campus activities programming. Hammond, in Chapter Seven, reminds the practitioner that there is no way to remove all risk from the education arena, summarizes some basic legal responsibilities, and discusses the development of a risk management plan.

The reader should be aware that a monograph of this nature cannot include discussion of all legal issues and that treatment of even the issues selected for presentation may not be as in-depth as some readers may desire. The purpose of this monograph is to serve as one professional resource in understanding legal aspects of professional responsibility; many other resources are needed for a working knowledge in this area.

The reader should keep in mind also that some legal requirements differ in the public and private sectors. Although most contributors have provided some discussion of these differences as they relate to their own particular topic, not all have done so. The reader will also note that some legal issues and

concerns are discussed by more than one of the writers. Although some editorial work was done to reduce duplication, treatment of an issue in more than one chapter remains because of the importance of that issue as seen by the writer treating responsibilities in a particular area. The editor recognizes that some readers may only read the chapter that relates specifically to what they perceive as their area of responsibility or interest. Perhaps the repeated inclusion of a particular legal issue may be an indication of the importance of that issue or a shift in the application of that particular legal principle.

It is the wish of the contributors, the editor, and the Monograph Board and Executive Committee of the National Association of Student Personnel Administrators that this monograph be of assistance in the day-to-day practice of student affairs professionals.

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CHAPTER ONE
Risk Management and Professional Responsibility

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Since the early 1960s the winds of legalism have been felt on college and university campuses across America. Whether the legalistic winds have blown with hurricane force or as a gentle breeze, few, if any, institutions and professional educators have been unaffected by these forces. Thus, it is crucial that today's student affairs professionals acknowledge different bases for student/institution relationships, as well as different considerations in college employer/employee relationships, if professional practice is to be improved. Since these legal bases are frequently altered or refined by constitutional amendment, judicial interpretation, and statutory and regulatory mandates, the individual student affairs practitioner, as well as his or her

divisional and institutional leadership, must assume responsibility for knowing and acting both within the law and in accord with the institution's purpose and mission.

It is important to recognize at the outset that the characteristics of the student population, the nature of the learning process and the various aspects of the employee/student/institution relationship are such that education is at best a risky venture. Although it is understandable that educators have become increasingly concerned about being held legally responsible or liable for their actions and decisions, professional educators must accept the fact that there is no escape from the normal risks associated with educational endeavors. Normal risk taking is a part of life and a part of almost any professional activity. Fortunately, when weighing the risks associated with their professional responsibility, most educators decide that the satisfactions gained from contributing to the development of students, and the successful implementation of programs and services are well worth reasonable risks.

Recognizing the fact that all legal risks cannot, and probably should not, be removed from the daily activity of student affairs professionals, it is highly proper that both individual and institutional efforts be directed toward developing and implementing good risk management practices. Effective educators need to be able to perform their professional duties with an awareness of the legal options available to them, as well as the requirements and restraints pertaining to them.

A sensitization to the legal parameters of professional activity is important for accepting professional responsibility. Persons who become paranoid about or are paralyzed by the possibility of legal responsibility will not be able to achieve adequately the educational objectives of their areas of responsibility. They will render less than optimum service to students and the employing institution and will probably not fully enjoy the benefits derived from working with students, faculty, and staff in the great enterprise of teaching and learning. The responsibility of student affairs professionals, then, is not to avoid professional risks but to learn to manage the legal risks encountered in their work.

Some Elements of Professional Responsibility

Although there are many important variables in developing risk management skills (i.e., type and level of responsibility, knowledge level, personality, administrative style), there are some essentials in assuming professional responsibility for one's decisions, actions, and inactions. The following identified elements are instructive on this point.

Know the Basic Sources of Educational Law

Kaplan (1978) identified eight main sources of education law: the federal and state constitutions, statutes at all levels, the major case law, administrative adjudications, institutional rules and regulations, institutional contracts, and academic custom and usage. Effective student affairs practitioners will be familiar with each of these main sources and how they apply to their own area(s) of responsibility.

Beginning with cases like *Dixon* v. *Alabama State Board of Education* (1961), *Tinker* v. *Des Moines Independent Community School District* (1969), *Goss* v. *Lopez* (1975), and *Healy* v. *James* (1972), the courts have now clearly established the applicability of the United States Constitution to the public campus situation. Of course, the United States Constitution is not applicable to a private college unless that institution has become so entangled with the state that students and staff come within the protective reach of the Fourteenth Amendment. Many private colleges, however, for educational and ethical reasons have chosen to provide as much evidence of "reasonableness," "fundamental fairness," and "provision of basic rights" as their public counterparts.

Federal, state, and local statutes also establish parameters that need to be understood. Regulations and procedures for implementing these statutes at various levels have been developed and promulgated. A legal obligation exists to be familiar with these statutes and their regulations for implementation, and where applicable to assure their enforcement.

A knowledge of case law to date gives one knowledge of established legal precedent applicable to one's jurisdiction, or

guidance where litigation may have occurred elsewhere but remains untested in one's own judicial area. Such familiarity also helps one to be aware of changing trends or unsettled areas of the law.

Since *Carr* v. *St. Johns University* (1962) reemphasized the contract theory for private colleges, and *Healy* v. *Larsson* (1971) interpreted the appropriateness of the contractual relationship for students in public universities and community colleges, numerous cases have been litigated to clarify and define the importance and nature of institutional contracts. Contract questions have not been limited to student and employee matters but also have dealt with relationships with outside vendors and a host of other groups and agencies.

An understanding of the elements of a contract, the authority to contract, and the implications for improper contracting are crucial in student affairs areas. Contracts may be expressed or implied through official publications such as the college catalog, student handbook, faculty manual, promotional brochures, official speeches, executive orders and memoranda, and oral consultation with college personnel, and awareness of this fact will cause personnel to be more cautious about the accuracy of content and means of distribution and communication than might otherwise be the case.

When questions need answering and certain disputes need to be heard, various administrative adjudicatory groups may be authorized to make decisions and take action. These may be at the national, state, local, and institutional levels. Such decisions often provide important guides for institutional operation and other internal decision making.

Indeed, it is important that student affairs practitioners be familiar with the sources of educational law, since such knowledge is a front-line defense against improper actions. A good knowledge base in this area will help enable them to function within established guidelines and also to enjoy flexibility and discretion where appropriate.

Ask the Basic Legal Questions

As a student affairs professional, the variety and impor-

tance of the decisions that face one will be considerable. There are key questions, however, that should be asked when making any major decision or taking any major action. First, the decider should ask: *By what authority do I take this action or make this decision?* The answer to this question is of primary importance in determining whether a person was acting within his or her official role. When one acts outside one's official scope of responsibility, one may be held personally accountable for such actions.

Second, the decider should ask: *Is there any existing educational law that prohibits me from taking a considered action or making a considered decision?* Decisions and actions in violation of constitutional, statutory, regulatory, contractual, or other established guidelines are likely to be made with greater risk of being successfully challenged than might otherwise be the case. Violations could result in litigation with a finding of criminal liability, contract liability, negligence, or some other area of tort liability, or in personal liability for denial of rights secured by the constitution and federal statutes.

A third question of professional importance to the decider should be asked: *In the absence of a required or prohibited position on this matter, what should I decide to do in this situation?* Since many of the decisions made by student affairs professionals are within their scope of authority and there is neither a required nor prohibited position, the decision should be made in the light of the facts of the situation, sound educational principles, and matters of reasonableness, fairness, and consistency.

Understand Basic Responsibilities As an Employee

In order to competently and confidently assume one's duties, an institutional staff member should recognize the fundamental components of the employee/student/institution relationship. This understanding is essential for one to interpret effectively the various competing rights and responsibilities of campus constituencies. It is the interplay between constituencies that gives rise to most educational, legal, and ethical questions.

Student affairs staff members share with all other college employees the following obligations: (1) to contribute to the car-

rying out of the purpose and mission of the institution; (2) to provide for the general health, safety, and welfare of students and others on the campus; (3) to help maintain order and discipline on the campus; (4) to act as reasonable and prudent persons; (5) to act in good faith; (6) to act within the scope of their responsibilities; (7) to act within the scope of the law; and (8) to honor the terms of their employment contracts.

In addition to responsibilities commonly held with other college and university employees, student personnel administrators have some special responsibilities: (1) to provide proper instruction and supervision of any faculty and staff to whom they have delegated responsibility and authority; (2) to assure that facilities and equipment under their purview are properly maintained, kept in a reasonable state of repair, and operated in a safe manner; (3) to know and assure the unquestionable constitutional rights of students and staff members (such as those secured by the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution) and those rights and privileges secured by various federal and state statutes (such as Title IX, Equal Pay Act, etc.); (4) to see that the institution's programs and services are accurately advertised and properly delivered; and (5) to see that all funds in their areas of responsibility are properly handled and accounted for (Young & Gehring, 1977; Bickel & Brechner, 1978; Owens, 1982).

Know Basic Rights and Responsibilities of Students

To keep the employee/student/institution relationship in proper perspective, educational practitioners must recognize that students have certain rights and responsibilities. Students are generally considered to have the following legal rights and responsibilities: (1) to enjoy reasonable privacy; (2) to be treated in a nondiscriminatory manner; (3) to be judged fairly in the classroom; (4) to express ideas without a "chilling effect"; (5) to associate with persons or groups of their choosing; (6) to be provided the terms of their contracts with the institution in a timely manner and in understandable terms; (7) to be granted a degree for meeting the academic and nonacademic requirements and standards of the institution; (8) to be provided appropriate due

process for suspension or expulsion for behavior-related matters; and (9) to be given a warning of impending termination for failure to meet academic standards (Owens, 1982).

Students can be expected to honor the terms of their contract with the college in both academic and behavior-related areas where those terms are in accord with the purpose and mission of the institution, sound educational principles, and applicable legal parameters. Students may also be expected to meet their financial and other obligations to the institution and to honor all applicable federal, state, and local laws (Young & Gehring, 1977; Owens, 1982).

Know Basic Rights and Responsibilities of the Institution

Not only do employees and students enjoy identifiable rights and responsibilities, but the institution as an agency of the state or as an incorporated body enjoys certain rights and responsibilities that deserve to be honored by both students and employees. Except where law dictates otherwise, the institution has the right to establish reasonable standards and procedures for admission, continuation, termination, and readmission to student status. Once standards in both the academic and nonacademic areas have been established in accord with the purpose and mission of the institution, the institution has the responsibility to provide students with these contractual requirements in a timely and understandable manner.

The institution has the right and responsibility to establish appropriate contractual agreements with administrators and staff as well as students and to expect both staff and students to honor terms of their respective contracts. The institution is obligated to honor and enforce its own established policies, procedures, standards, and contracts; students, employees, and other contracting parties should expect such enforcement. The institution has the right to remove from its campus any individuals who are a threat to others, themselves, or institutional property; it may also remove those persons who disrupt the orderly operation of the college, who substantially interfere with the educational process, or who engage in inciting unlawful activity.

In addition to operating in accord with its legal charter or other legal basis, the institution is obligated to operate within all applicable constitutional, statutory, regulatory, contractual, and other legally binding commitments. The institution must further assure that the institution's status and its programs and services are properly advertised in order to establish a good faith relationship with prospective students and the public at large (Young & Gehring, 1977; Bickel & Brechner, 1978; Owens, 1982).

Know Some Fundamental Facts about Liability

Recognizing the competing rights of students, employees, and the institution, decisions inevitably will be made and actions taken where there will be disagreement regarding such decisions' appropriateness or legality. In such cases, the existence of legal responsibility or liability for the decision or action must be established.

The responsibility may be placed on the institution, the employee in his official capacity, the employee in his personal capacity, or a combination. *Criminal liability* may be found where one has committed a crime or knows that a crime has been committed and then conceals that information from appropriate persons. Criminal intent as well as a forbidden act are usually required for criminal liability. Although there are examples of criminal liability in the case law that are related to activities in colleges and universities, case law in this area is fairly limited, considering the large number of college and university employees. Remember that no person can legally delegate an illegal act and to accept such a delegation is extremely unwise.

Contract liability, a type of civil liability, may arise when a person or institution breaches an existing contract with another party(ies) and damages result. It is important to understand one's contracting authority, the elements of a contract, the penalty for failure to honor the contract, and appropriate grounds and means for terminating a contract. Contract liability is becoming increasingly important for both private and public college administrators and staff, as students have assumed a more contract/consumer posture in relation to the institution, and as

institutions subcontract for many services, facilities, and programs.

Tort liability is a civil wrong, other than a breach of contract, for which a court will provide a remedy the means by which a right is enforced or the violation of a right is prevented, redressed, or compensated for damages. The remedy may be declaratory, injunctive, or may involve compensatory or punitive monetary awards. The tortious wrongful act may be against a person, a person's property, or a person's reputation, character, or memory. The wrongful act may be either intentional or unintentional, knowing or unknowing. The fault in a tort lies in being the person who causes the act or fails to prevent an act that results in harm or damage.

Case law in the tort area includes some cases concerned with allegations of assault, battery, false or illegal restraint, and mental suffering. Most of the tort liability case law on college campuses, however, is found in the areas of negligence and defamation. Student affairs professionals need to give special attention to understanding the elements of negligence and defamation as they relate to personal behavior and to one's supervisory role. These elements are discussed in later chapters.

Constitutional and statutory tort liability has been the basis for a considerable body of law in the last decade, as personnel in public colleges and universities have been charged personally for denial or abridging of rights secured by the United States Constitution or by various federal statutes. These charges have been based on Section 1983 of an 1871 civil rights law. In *Wood* v. *Strickland* (1975), the Supreme Court indicated that an individual may be held accountable under this law if he or she *knew or reasonably should have known* that his or her actions violated these rights. The erosion of sovereign immunity and the willingness of the courts to hear cases under Section 1983 increase the need to be aware of those secured rights. Further discussion of this topic occurs later in this monograph.

Know When to Call in the Experts

There is a popular saying that reads, "Half of being smart is knowing what you are dumb at." More professionally put, ". . .

The special relationship between school [administrator] and student is sufficient to impose a duty upon the former to discover its own ignorance." (Restatement of Law of Torts).

The training, background, and responsibilities of most student affairs professionals have somewhat of a generalist tone, although the individuals may be quite knowledgeable or expert in certain areas. A knowledge of legal issues is not an area where most people have become expert, although many have achieved adequate knowledge to permit them to function professionally with a considerable degree of competence and confidence.

If one's level of knowledge about legal issues, finance, insurance, personnel matters, and other important areas is limited, don't be hesitant to seek counsel from more experienced colleagues or known authorities. Will Rogers once remarked that the test of an intelligent man is knowing how to spell a word well enough to look it up in the dictionary. Neal (1980) reminds us that perhaps the test of a good administrator is knowing enough about the law of higher education to know when to call a lawyer. The same might be said about other experts.

Developing a Risk Management Plan

As student affairs professionals seek to manage the risks associated with their individual and collective responsibilities, a process is needed for assuring that risk management is an ongoing professional responsibility. Both individual and institutional processes and plans need to be developed and both short-term and long-term perspectives should be considered.

Individual Risk Management

If a student affairs professional keeps in mind the elements of professional responsibility discussed earlier in this chapter, a major step has already been taken toward managing the normal risks associated with professional activity. A knowledge of the sources of educational law, a consideration of the legal questions related to a discussion or action, an understanding of the responsibilities one has as an employee, a knowledge of the

rights and responsibilities of students, an awareness of the rights and responsibilities of the institution, a knowledge of basic facts about liability, and a recognition of when to call in the experts will be of considerable value in helping one approach professional responsibility from a more protective but not necessarily restrictive point of view.

Not only should one have some sense of one's responsibilities as a professional, but one should have a definite plan for identifying risks related to those responsibilities, a system for weighing those risks and deciding which are worth taking, and a means of eliminating, minimizing, managing, or transferring risks as determined by their value or necessity. Learning about job responsibilities and related risks, planning to avoid forseeable risks, and insuring to protect oneself against major personal loss for legal liability are important individual steps. Writers in later chapters will share certain information about legal issues, identify some associated risks, and/or suggest means of managing related risks.

Institutional Risk Management

An institution has an obligation to fulfill its educational objectives in good faith and in accordance with established legal parameters. Since an institution can only act through its employees and appropriate governing and administrative bodies, proper precautions should be taken to assure the fiscal welfare of the institution, the achievement of the institution's mission, and fair protection and treatment for those who enter into a good-faith relationship with the institution as a whole or its various agents.

Indeed, individual employees should be concerned about risk management as they approach their daily professional responsibilities; they also have the right to expect that their institution, through appropriate means, helps assure understanding of their various roles and the provision of support and protection. An overall risk management plan should be developed and adopted by the institution and likewise by the student affairs division. Individual risk management efforts would then appropriately fit into the larger institutional plan.

Through indemnification, contractual agreement, or insurance, an institution should provide reasonable protection for its individual employees who may in some way cause injury to another, even though they are performing their duties to the best of their ability and in good faith. If no such protection is available, that information should be clear to persons with responsibilities that involve other than minimal risks.

An effective institutional management plan must affect all levels and all areas of the campus; its development should include broad input from affected groups and individuals and should be a cooperative endeavor. Once the plan is adopted it should be broadly disseminated and given considerable priority. It must be clear that the institution expects to operate in such a way as to protect its own reputation and well-being while assuring the same for those who work and study there.

Summary and Conclusion

There is no way that all risks can or should be removed from the interactive relationship between students, employees, and the institution. Since risk will always be present and since most educators consider the benefits of the interactive relationship worth reasonable risks, the challenge facing today's student affairs professionals is how to best manage the risks associated with their professional activity. Increased understanding of some important elements of professional responsibility and the development of individual and institutional risk management plans are suggested for the benefit of employees, students, and the institution.

Student affairs programs and services should be established by professionally competent individuals, should be based on rational, equitable, and sound educational principles, and should be administered with competence, common sense, patience, restraint, concern, and sensitivity. The counsel of experts should be sought as needed, but the competence and perspective of the day-to-day practitioner should not be overlooked nor considered lightly. Although concern about legal liability is un-

derstandable in today's litigious society, a competent student affairs professional will not permit an undue concern for minimizing personal risks to overpower the ability to be creative, flexible, and challenging in the response to student and institutional needs.

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CHAPTER TWO
The Student/Institutional Relationship: A Legal Update

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The relationship between the student and the university is constantly being defined by the courts. Since the law is ever evolving, it's imperative that student personnel administrators keep abreast of the current parameters regarding the relationship between the student and the institution. The purpose of this chapter is to outline the current court definitions of that relationship.

Prior to 1961, the relationship between the student and the university was one in which the university stood *in loco parentis* to the student. That concept placed the student under the juris-

diction of the institution, which was able to stand in place of the parent and which could regulate the student in any manner it chose up to the limit that the parent could.

Since the *Dixon* case in 1961, the doctrine of *in loco parentis* has been replaced with a relationship that might best be described as constitutional. This means that students are citizens and do not shed any of their constitutional rights when they enroll in a public college or university. But on the other hand they do not gain any special privileges upon enrollment. The institution must now respect all of the constitutional rights of students and any restriction or regulation of those rights must be justified in light of the legitimate aims and purposes of the institution.

In addition to the constitutional relationship, there is a contractural relationship between the student and the institution. The elements of a contract are present by virtue of: (1) an offer by the University for students to attend and partake of its curriculum and services; (2) an acceptance by the student of that offer; and (3) consideration (money) tendered by the student.

Differences Between Public and Private Institutions

There is a fundamental difference between public and private institutions of higher education that is founded upon the Fourteenth Amendment to the United States Constitution. That amendment prohibits a state from depriving a citizen of rights secured in the Bill of Rights (first ten amendments, which are prohibitions against the federal government depriving citizens of rights embodied in those amendments). Simply put, the Fourteenth Amendment declares that no state shall deprive any citizen of life, liberty, or property without due process of law or equal protection of the laws. Since public colleges and universities are extensions of the state, and thus when they act it is the state acting, they fall under the prohibitions of the Fourteenth Amendment and therefore must respect all of the constitutional rights of students as set forth by the courts.

The Fourteenth Amendment does not refer to or place a restriction upon private action. Therefore, private citizens and private institutions of higher education are not bound by the prohibitions in the Amendment. Thus the private institution is not in a constitutional relationship with its students unless it is in some way acting on behalf of the state.

Courts are frequently asked to determine whether a particular private institution is engaged in "state action." In making that determination, courts shift and weigh the circumstances surrounding the particular institution's involvement with the state (*Hammond* v. *University of Tampa*, 1965; *Grossner* v. *Trustees of Columbia University*, 1968; *Powe* v. *Miles*, 1968; *Browns* v. *Mitchell*, 1969; *Robinson* v. *Davis*, 1971; *Blackburn* v. *Fisk University*, 1971; *Howard* v. *NCAA*, 1975; *Shapiro* v. *Columbia Union National Bank and Trust Co.*, 1978; *Greene* v. *Johns Hopkins University*, 1979; *Narango* v. *Alverno College*, 1980). Generally, state action is not involved in controversies arising from private actions unless it can be shown that the private institution is so entwined with the state that the state action concept would apply. The mere receipt of public funds by a private institution or the enjoyment of a tax exemption are insufficient to justify a finding of state action. Also, the public function of "educating persons" has been rejected as constituting state action on the part of a private institution.

In summary, the relationship between the student and the public university is constitutional in addition to contractual. The relationship between the student and the private university is primarily contractual unless the institution is engaged in state action, whereupon it then must respect the constitutional rights of its students and the resulting relationship would be the same as with the public institutions.

Constitutional Rights

During the decades of the 1960s and 1970s, there was a proliferation of court cases involving the constitutional rights of students. These rights were recognized by the courts, and today

the courts continue to define the parameters of the relationship between the student and the institution regarding constitutional rights.

Those freedoms embodied in the First Amendment are the foundations of a free society. They have been referred to by the United States Supreme Court as "preferred freedoms" (*United States* v. *Carolene Products Co.*, 1938, and numerous subsequent decisions).

First Amendment freedoms of speech, assembly, and expression are tenaciously protected by the courts. The courts have been explicit in pointing out that a college campus is not public in the sense of parks, streets, etc., and thus not open for expressions of free speech by the general public at all times and places (*Evers* v. *Birdsong*, 1968, and numerous other cases).

Colleges and universities are ideally free marketplaces of ideas. This dictates that all points of view are welcomed since free expression is a cornerstone of the academic arena. However, the institution must promulgate and enforce necessary rules and regulations in order to insure that campus activities are consistent with the real aims and programs of the institution.

Colleges and universities have an inherent authority to maintain order and freedom on campus as there is no absolute freedom of speech and assembly. At public colleges and universities, there can be no prior restraint on speech or assembly such as a prohibition against demonstrations and mass gatherings without prior approval. The right of students to express views through demonstrations and mass gatherings is protected on campus so long as students do not materially disrupt the normal on-going campus functions, interfere with the rights of others, or engage in the destruction of property. If students plan or participate in a lawful demonstration that subsequently becomes violent and destructive, then only those who personally engage in the unlawful conduct may be subject to disciplinary action. Students may not prohibit others from free movement on campus and use the First Amendment as a justification for their action.

Colleges and universities may promulgate and enforce necessary ground rules regarding campus demonstrations and

mass gatherings. These are rules that regulate the time and location for holding meetings on campus and require that reservations for the use of certain areas be made in advance. An advance notice requirement of approximately forty-eight hours is a valid and reasonable method by which the problem of simultaneous and competing demonstrations may be avoided. Further, this type of requirement allows the institution to provide for adequate police protection for both the demonstrators and the institution's property. It must always be remembered that although a campus regulation regarding freedom of expression or assembly may be valid on its face, it can be unconstitutionally applied.

The wearing of arm bands to express a point of view is an example of symbolic expression that is protected by the First Amendment. As is true with any attempt to restrict or regulate First Amendment freedoms, the prohibition of symbolic expression must be clearly justified by the existence of a clear and present danger to the normal activities of the institution or to the health, safety, and welfare of individuals on campus (*Tinker* v. *Des Moines Independent Community School District*, 1969, and numerous other cases).

Freedom of the press is another First Amendment freedom applicable to the public campus setting (*Papish* v. *Board of Curators of University of Missouri*, 1973). Student publications as well as other off-campus publications are protected on campus. Court cases are filed each year relating to student publications, particularly involving the student newspaper. Although it is not mandatory that a college or university sponsor a student publication, institution officials may not exercise censorship of student newspapers and other publications. Restraint of censorship also applies to those student publications that are aided financially by the state or by mandatory student fees. In the absence of a showing of material disruption, interferences with the rights of others, or that the publication is libelous or obscene, censorship and control of such publications by college officials is deemed an unwarranted interference with protected constitutional rights. Campus officials may restrict the distribution of printed material that is calculated to cause disturbance and dis-

ruption of school activities or to bring about ridicule and contempt for school officials. A college or university may disassociate itself from a particular student publication. This can be done by placing a disclaimer on the publication such as "This is not an official publication of the University." In sum, various publications, either student or off-campus, may not be kept off campus by college officials unless it can be shown that the distribution would constitute a clear and present danger to the normal operations of the campus.

Freedom of association is a right guaranteed by the United States Constitution. Public college administrators, thus, may not prohibit students from forming and participating in organizations. Colleges may require student organizations to apply for "official recognition" (use of college facilities, scheduling, etc.). This process may include providing the institution with the purpose of the organization, names of the officers, and assurance that the organization will abide by reasonable college regulations. The burden of nonrecognition falls on the institution, rather than the organization, once "official recognition" is requested. In other words, the college must provide justification why it has failed to grant "official recognition." The justification must be more than just disagreement with the group's philosophy. Reasonable justification for nonrecognition could be: (1) the group's advocacy of views directed to inciting or producing imminent lawless action, and likely to produce or incite such action; (2) the group's failure to show a willingness to comply with reasonable college regulations; and (3) the organization's engaging in any unlawful or disruptive activity or conduct (*Healy* v. *James*, 1972).

College officials must treat all groups alike insofar as recognizing them and allowing them to use campus facilities. The act of recognizing student organizations does not entitle the group to access to institutional equipment (i.e. computers, typewriters, duplicating machines, etc.).

A college or universtiy may require that the names of the officers of an organization and its purposes be made public. However, a request for the disclosure of the entire membership of an organization would be an unconstitutional intrusion upon

associational freedom and the right to privacy.

In recent years on campus there has been increased interest and activity of a religious nature. The parameters relating to religion on a public campus are at times difficult to determine, since the courts have pointed out that government does not have to be hostile to religion, but rather, can cooperate with religion.

The United States Supreme Court has ruled that a state university policy that permits recognized student organizations to use campus facilities for political, cultural, educational, social, and recreational events, but prohibits recognized student groups from using campus facilities for religious worship service or teaching, violates First Amendment guarantees (*Widmar* v. *Vincent*, 1981).

Students, like any other citizens, are protected by the Fourth Amendment to the United States Constitution against unreasonable searches and seizures. If, however, there is "reasonable cause to believe" that a criminal law is being violated or that harm or danger is present, a search may be considered reasonable. The reasonableness of a search can be determined only by an examination of the facts in each case. College officials have been upheld by the courts in the warrantless search of a student's room where such action was a reasonable exercise of the college's duty to maintain discipline and an "educational atmosphere." However, the authority to conduct such a reasonable search may not be transferred to civil authorities. Civil authorities must conform to the search standards of the Fourth Amendment.

The legal status of search and seizure on campus is constantly evolving (*United States* v. *Chrisma*, 1982, and numerous earlier cases). Therefore, if at all possible, college officials should procure a warrant, if time and circumstances permit, prior to any search of a student's room or personal belongings. But emergency situations do occur on campus and in those instances appropriate officials may conduct necessary warrantless searches. Normal inspection of student rooms for health, safety, and standards of maintenance are obviously within the authority of college officials and warrants need not be obtained for

these types of inspections. Evidence found as a result of either of these types of searches may be used against the student in a campus hearing. College officials are not obliged to close their eyes when they encounter evidence that is in "plain view." Such evidence may be seized and introduced into a campus hearing.

Since the *Dixon* case in 1961, students enrolled in a public institution, or a private institution that is engaged in state action, have a constitutional right to due process prior to any long-term suspensions (*Dixon* v. *Alabama State Board of Education*, 1961). There are two types of due process, procedural and substantive. *Procedural due process* refers to the procedures and methods used in seeing that laws and rules are carried out and enforced. *Substantive due process* questions not only procedure but whether the purpose or the implementation of the law or regulation is fair, reasonable, and just. The courts do not precisely define due process, but rather define it by the gradual process of "judicial inclusion and exclusion" on a case-by-case basis (*Davidson* v. *New Orleans*, 1877).

Due process requires some degree of specificity of rules and regulations but is not as specific as the criminal code. The degree of specificity required is that which will allow a student to adequately prepare a defense against the charge.

Students at a tax-supported institution or at an institution where state action is involved are constitutionally guaranteed the right to notice and hearing prior to suspension or expulsion. Procedural due process requires that students be given a written notice of the specific charges against them, the time and place of the hearing, evidence that will be presented, and the possible action to be taken against them if the charges are supported. An accused student cannot frustrate the notice process by failing to keep the institution informed of a change of address (if the institution requires notification), and by the subsequent failure to actually receive the notice. College officials are only required to employ their best efforts and nothing more in attempting to give written notice to a student.

Student disciplinary proceedings have been held to be civil and not criminal proceedings and therefore do not necessarily require all of the judicial safeguards and rights accorded to crim-

inal proceedings. The hearing itself should provide the student an opportunity to present his defense and present witnesses in support of his case. There is no general absolute requirement at this time that the student be warned against self-incrimination or be permitted to cross-examine witnesses. Also, rules of evidence that apply in criminal proceedings, such as the hearsay rule, are not applicable. There is also no requirement that the hearing be open to the public or members of the college community. In fact, an open hearing would violate the Buckley Amendment unless the student approved that the hearing be made public. The student is entitled to appeal the decision. The hearing is not intended to be a full-blown adversary proceeding, but simply a fair and ample opportunity for both sides to present the facts.

Procedural due process does not guarantee students the absolute right to be represented by counsel in disciplinary cases. Institutions may allow students to be represented by legal counsel or other advisers, but this is the prerogative of the institution. This is not to say, however, that in a specific case it might not be determined that in order for a student to receive a fair hearing he must be allowed legal counsel. There is simply no absolute right to counsel in all cases, since it must be remembered that campus proceedings are civil and not criminal. If, however, the institution proceeds through counsel in the campus hearing, then the student does have the same right to be represented. Also, if a student is charged with a serious crime off-campus as well as on campus, the student should be allowed to have his attorney at the hearing in order to advise the student.

Sometimes a college or university is faced with a situation where it takes action on its code of conduct prior to action taken by the courts, in a case where a student has allegedly violated both campus regulations and statutory laws. This does not constitute double jeopardy for the student, since the campus and the community are two separate jurisdictions. Therefore, the proceedings are independent of one another and one need not necessarily await the outcome of the other. When a student is suspended or expelled by a college in this type of situation, this does not constitute double or increased punishment; it is simply

a consequence of the student's actions. The institution is maintaining its integrity by lawfully determining that the student is unfit to continue in the academic community.

Sometimes university officials may feel the need to suspend a student immediately, without waiting for the normal notice and hearing due that student. It may be felt that the student is disruptive, incorrigible, or even dangerous to self, others, or property. Under such circumstances an interim suspension may be imposed pending normal notice and hearing at a later date.

An interim suspension may not be based upon a presumption of guilt. Rather, an interim suspension should logically be based upon facts which show that the student's continued presence on the campus constitutes a danger to ongoing campus functions, to property, to the student himself, or to others. Students who are suspended on an interim basis must be accorded a preliminary hearing unless it can be shown that it is impossible or unreasonably difficult to afford it. In any event, the student, at the earliest possible time, must be provided an opportunity to show why his continued presence on campus does not constitute a danger to campus functions, to others, to himself, or to property (*Stricklin* v. *Regents of University of Wisconsin*, 1969).

Traditionally, most colleges and universities have provided resident housing for their students. Although private colleges may do so, public colleges and universities may not require students to live in college residence halls, if such a requirement is primarily to increase the revenue of the housing system. Students may be required to live in residence halls of public institutions if such a requirement is based upon the "living and learning" concept and the educational benefits to be derived therefrom (*Prostrallo* v. *University of South Dakota*, 1974). However, under equal protection guarantees of the Fourteenth Amendment, specific groups of students may not be singled out without any valid reason to be subjected to such a requirement.

Statutory Rights

In addition to constitutional rights that students inherently have as citizens, they also enjoy certain other rights that are the result

of laws enacted by Congress. These statutory rights are applicable to students enrolled in any institution, public or private, that is subject to the legislation—usually by the receipt of federal funds. The *primary* statutory rights of university students are those found in Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Family Educational Rights and Privacy Act of 1974.

Title IX of the Education Amendments of 1972 states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." It is beyond the scope of this chapter to cover all aspects of Title IX. Multitudes of publications have been produced dealing with the numerous applications of this legislation. Also, an untold number of court decisions have struggled with the parameters of the legislation in light of the intent of Congress. Although it is laudable that there be no discrimination on the basis of sex, there are certain exceptions outlined in the regulations that implement Title IX. The exceptions are an attempt to recognize legitimate reasons for different treatment based upon sex.

Section 504 of the Rehabilitation Act of 1973 parallels Title IX by stating that "No otherwise handicapped individual in the United States, as defined in Section 7(6) [29 USC, paragraph 706 (6)], shall solely by reason of his handicap be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." A handicapped person is defined as any person who (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment. The main thrust of this legislation is that handicapped individuals not be discriminated against solely on the basis of their handicap and that they be "mainstreamed" into campus life as much as possible. As with Title IX, much has been written on the topic and numerous court cases have dealt with this legislation in keeping with the intent of Congress.

The United States Supreme Court has rendered one especially significant decision relating to a handicapped student. In that decision, the Court held that Section 504 does not prohibit professional schools receiving federal funds from imposing valid physical qualifications for admission to clinical training programs conducted by such schools. The Court also held that Section 504 does not compel a federally funded educational institution to disregard the disabilities of a handicapped individual or to make substantial modifications in its academic program to allow disabled persons to participate (*Southeastern Community College* v. *Davis*, 1979).

The Family Educational Rights and Privacy Act of 1974, popularly known as the Buckley Amendment, insures that only appropriate "school officials" with a "legitimate educational interest" may see student files without the consent of the student. The legislation also provides students with access to all information placed in their official files. Students have the right to an informal hearing regarding information in their files and if they do not receive satisfaction at the hearing, they may insert explanatory material into their files. The legislation does not grant students the right to contest grades, although they may request a hearing to contest whether the grade assigned by the professor has been correctly recorded. The regulations implementing this legislation do allow for student waivers under certain circumstances. The regulations are fairly specific in outlining just what institutions must do in order to comply. Although much has been written concerning the Buckley Amendment, there has not been a multitude of court cases regarding the legislation. It may be that the legislation has not caused the degree of problems that was originally feared by higher education officials.

From time to time, Congress enacts various pieces of legislation affecting college and university students. One example is in the area of student financial aid. Usually, the regulations implementing this type of legislation are fairly specific and are of interest primarily to those officials dealing with that aspect of student life.

Contractual Rights

In addition to constitutional and statutory rights that students possess, they also have certain contractual rights. The college or university outlines in its various publications what its rules, regulations, and requirements are as well as what services are offered. Upon payment of all fees by the student, a contract has been entered into which requires that both parties respect the terms of that agreement. Students may also enter into contracts for such things as housing and meal plans.

In academic affairs a contractual relationship exists between the student and the institution. The basic provisions of the college catalog, recruiting brochures, various bulletins, and the student handbook usually become part of the contract. These include such provisions as tuition, fees, refund policies, and program and graduation requirements. The institution also sets forth certain requirements for passing courses and for successful completion of programs and graduation. If the student fails to meet the required standards, he can be dismissed. But if the institution fails to respect its own regulations, then the student may seek judicial relief. In fact, more court decisions are being rendered today dealing with academic matters than any other aspect of the student/institution relationship. A few examples *include: Healy* v. *Larsson,* (1971); *Mahavongsana* v. *Hall,* (1976); *Board of Curators of University of Missouri* v. *Harowitz,* (1978); *Olsson* v. *Board of Higher Education of the City of New York,* (1980); *State of Montana* v. *Peretti,* (1981); and *Hines* v. *Rinker,* (1981).

Liability

The relationship between the student and the university is such that liability may arise in the various aspects of student life. Although liability is not the primary topic for this chapter, as it is dealt with more fully in other chapters, it is appropriate to point out that there are two types of liability present in the student/university relationship. The first type is the traditional tort liabil-

ity. The primary tort under this category is that of negligence. Tort liability is based upon state laws and thus varies greatly from state to state. The other type is civil rights liability, or "constitutional" torts. This type of liability is based upon the 1871 Civil Rights Act which allows for suits in those instances where an individual's civil rights have been violated.

Summary Suggestions for Student Personnel Administrators

Student affairs administrators must deal with students on a day-to-day basis in areas where crucial decisions must be made and resulting actions taken. More than any other group, these administrators must be aware of the current legal parameters within which they may make decisions and take the resulting action. Although a list of suggestions for administrators could be endless, the following are set forth as a basis for all who deal with students:

1. Have the college or university attorney review periodically all catalogs, bulletins, student handbooks, recruiting brochures, etc.

2. Have the college or university attorney review periodically all policies, procedures, and practices relating to students.

3. Sign your name and official title when you sign contracts and other documents.

4. Make sure that the recognized standard of care is adhered to when various activities and related matters are allowed. Weigh the risks, consider the options, weigh legal and other considerations. Challenge the law if necessary to clarify parameters. Do what your best judgment and counsel indicates.

5. Make provisions for the purchase of insurance or other protection for staff and for students involved in various activities such as field trips, intramural athletics, and the like.

6. Keep abreast of legal guidelines and established practices for your profession by reading appropriate publications, attending legal seminars, etc.
7. Keep staff members aware of legal guidelines and expected standards so that they will be able to exercise appropriate caution.
8. Act as a reasonable and prudent person would act under similar or like circumstances.
9. Seek legal advice when in doubt about any decision that may result in legal consequences.

Finally, it must be remembered that there are times when there is no ready solution, yet some decision must be made and oral action taken. After all options are considered, the student affairs professional should simply do what appears to be the right thing under the circumstances. The "golden rule" should be practiced. If that rule is followed, policies and practices should be created and maintained that respect the worth and the dignity of each individual. This in itself will help create a climate in which the incentives for legalism are reduced and where the real purpose of institutions and needs of students can be met.

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CHAPTER THREE
The Chief Student Affairs Officer as Employer and Manager: A Special Risk

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This chapter will focus on some of the major legal, professional, and personal risks encountered by the chief student personnel officer as employer and manager of the student affairs office. Chief student personnel officers often are named as defendants in lawsuits based on their overall responsibility for management. The actual degree of liability would depend on their authority and the facts of each case.

Computer technology is adding a new dimension to the more familiar risks faced by chief student personnel officers. Examples of computer-related risks include: breaches of privacy and damage caused by "hackers" who gain unauthorized access to office files; disputes over who owns a new computer program developed by an employee or student working in the office; misuse or theft of office funds through computer manipulation; damage to computer equipment; and lack of required due process caused by poorly designed computer programs. While this chapter is too brief to cover computer-related risks, interested persons may learn more about them through references appearing at the end of this chapter.

Institutional Risks Compared to Personal Risks

Most risks faced by chief student personnel officers arise out of decisions made as part of their official duties. These decisions are thought of as being within the scope of their employment or authority. Such risks usually are shared with the institution, and any damages assessed against an individual officer normally, but not always, would be covered by the institution through indemnification or insurance.

However, where a chief student affairs officer acts outside of his or her authority or employment, as in defiance of official policy, or by depriving a person of clearly established constitutional rights to a malicious degree, or as a prank, or by committing a criminal act, the individual official could be personally liable. Damages assessed would be paid then out of personal funds. Jail sentences would be served, of course.

Chief student personnel officers who *properly* delegate authority to subordinates may not themselves be liable for the wrongful acts of subordinates, unless the chief officer participated in the formulation of an unlawful policy carried out by the subordinate, or the subordinate's acts were within the chief officer's control and responsibility and the officer knew of, directed, condoned, or otherwise participated in the act.

Sources of Legal Rights — A Major Difference Between Public and Private Institutions

Constitutional rights exist at public institutions but usually not at private institutions. This is true because officials at public institutions generally are viewed as public officials performing state actions. State actions are subject to federal and state constitutional standards and restraints. For instance, under most circumstances, employees at a public institution may not be terminated solely for exercising their First Amendment right to free speech. If, however, such exercise of free speech is found to substantially interfere with the close working relationship of an employee and a supervisor, termination could be permitted as an exception to the general rule (*Pickering* v. *Board of Education*, 1968). Or if there were a separate genuine reason for termination, in addition to the exercise of free speech, the termination could be upheld (*Mt. Healthy City School District Board of Education* v. *Doyle*, 1977).

Constitutional standards need to be known by chief student personnel officers because if they take actions that they knew or should have known would deprive a person of clearly established constitutional rights, they may be held *personally* liable (*Wood* v. *Strickland*, 1975). The action is deemed almost malicious in such a case, and not within the normal scope of employment of authority. If actual damages cannot be proved, nominal damages of one dollar may be awarded (*Carey* v. *Piphus*, 1978).

Sources of Legal Rights at Both Public and Private Institutions

At both public and private institutions, the following are important sources of legal rights:

1. *Statutes and presidential executive orders*, such as employment laws and regulations regarding minimum wages, safety, discrimination, affirmative action, and criminal acts;

2. *Contracts,* including the policies of governing boards, employee and student handbooks, college catalogs, and the traditional customs and practices of the institution; and
3. *Torts,* such as negligence, and libel and slander.

Remedies Possible in Suits Filed Against the Chief Student Personnel Officer

Unlawful practices may be very costly in monetary terms. An employer may be obliged to hire a rejected job applicant or reinstate a terminated employee. Back pay and salary adjustments are possible. Damages may be awarded, injunctions and declaratory relief may be ordered. Federal funds may be affected. Where constitutional rights have been violated at public institutions, personal liability is possible. In criminal cases, fines and/or imprisonment are probable. Attorneys' fees and court costs may be assessed. In addition, valuable time may be lost appearing in court. An institution's or officer's reputation may be damaged. Low morale may result and adversely affect the operation of the student affairs office.

Personnel Practices

The general rule, of course, is that an employer may make personnel decisions in any manner that he or she pleases. The only restrictions are those voluntarily agreed to by the employer and the employee, and those required by law.

A chief student personnel officer should note several principal areas of high risk related to employment decisions that (1) violate the institution's own contracts or rules governing the hiring, pay scale, promotion, transfer, nonrenewal, or termination of administrators and staff members; or (2) violate federal or state statutes, such as those regulating wages or prohibiting discriminatory employment decisions; or (3) at public institutions, violate constitutional rights, such as First Amendment (free speech) or Fourteenth Amendment (due process).

Institutional Employment Rules

Appointment. A chief student personnel officer must understand the term or length of his or her own appointment and that of subordinates. Many institutions appoint student affairs employees to serve at the pleasure of the president, the chief student personnel officer, or some other officer. Other institutions use a contract for a specific term. Very few institutions award tenure contracts to student affairs employees unless they also happen to be faculty members. If so, an individual may have tenure in his or her faculty position but not in the administrative post. This sometimes is the case for the chief student personnel officer.

Nontenured or term appointments carry with them only the protection agreed to by the parties. Unless evidence of statutory authority to the contrary exists, most nontenured employment relationships carry with them no expectancy of continued employment, no right to notice of nonreappointment, no right to a hearing, and no right to reasons for nonreappointment (*Board of Regents* v. *Roth*, 1972).

The chief student personnel officer should be aware of all employment terms and conditions agreed upon by the institution. These usually are set out in the policies of a governing board, a handbook, and/or a contract. The longtime customs and practices of the institution play a role as well. Courts have held that employment contracts at educational institutions may include the hiring policies and practices of the institution as embodied in its employment regulations and customs (*Greene* v. *Howard University*, 1969).

Thus, if an employer stated in a handbook or other form of contract that an employee would be evaluated periodically, or would be given a certain amount of notice prior to separation, the employee could have a legal right to evaluation or to prior notice. If a statute required similar conditions, similar legal rights would exist.

At a public institution where there are written policies providing for an expectation of continued appointment, a nonrenewed employee could have a constitutional property interest in employment, and be entitled to Fourteenth Amendment due

process, in the form of notice and a hearing, before being terminated (*Perry* v. *Sinderman*, 1972).

Evaluation, Salary, Promotion, and Termination. Courts normally are reluctant to interfere with judgmental decisions regarding merit. If there is evidence of capriciousness, malice, nonadherence to institutional rules, violation of statutes, or deprivation of constitutional rights, a court then may agree to determine whether the decision was made according to merit or for some unrelated, impermissible reason.

Review Hearings. Review hearings regarding adverse employment decisions may be provided voluntarily by institutions on the basis that they are good management tools. However, review hearings are required in some situations. A hearing would be required where an employee has a contract and there is to be a termination for just cause. Hearings may or may not be required where the reason is financial exigency; this decision depends on the particular circumstances of that situation. Another situation requiring a review hearing would be at a public institution where a person's constitutional rights may be affected.

Basically, the purpose of an impartial review hearing is to assure that the employee has been informed of the charges, including testimony of witnesses, and has been afforded an opportunity to respond to them in a meaningful way. As a general rule, the following would be appropriate, according to *Ferguson* v. *Thomas* (1970), at an informal review hearing:

1. The employee would have a colleague or counselor along, though not necessarily an attorney. An informal hearing need not conform to all rules of courtroom procedure.
2. The employee would be present to hear all charges and the testimony of all witnesses, including testimony submitted in writing rather than in person.
3. The employee, having been notified in advance of the charges as well as the identity of witnesses who would testify, would be given an opportunity to

counter the charges, question witnesses, and present his or her own responses and witnesses.

4. The review committee would hear all evidence it deemed relevant.

5. If a transcript were made, the employee would have access to it, at the very least to make notes. Some procedures provide a free copy of the transcript to the employee upon request. Other procedures charge a minimal copying fee.

6. The employer would make clear that persons who participate in review hearings would be protected from reprisals.

General Employment Statutes. A number of employment statutes, federal or state, affect such employment conditions as pay, safety, and retirement pensions. Examples are:

1. *The Fair Labor Standards Act of 1938 (FLSA),* which provides for minimum wages and maximum hours.

2. *The Occupational Safety and Health Act of 1970 (OSHA),* which sets standards for safety and health in places of employment.

3. *The Employee Retirement Income Security Act of 1974 (ERISA),* which sets standards for private pension plans.

Discrimination Statutes — Equal Employment Opportunity Laws

Equal employment opportunity is sought through laws and regulations prohibiting employment decisions that are not made on the usual basis of merit, but instead are made on the basis of nonjob-related characteristics such as race, color, religion, sex, national origin, age, or handicap.

The following are examples of equal employment opportunity laws that affect most educational institutions:

1. *Title VII of the 1964 Civil Rights Act,* as amended by the *Equal Employment Opportunity Act of 1972,* prohibits employment discrimination based on race, color, religion, sex, or national origin. It also includes prohibitions against sexual harassment and discrimination based on pregnancy.

Early Title VII cases often were based on claims of race dis-

crimination. More recently, sex discrimination has been a predominant focus of many cases.

Under Title VII, in a case involving a claim of discrimination in refusing to hire an individual, an employer may have to defend in court the job qualifications stated in an advertisement for a particular job. In order to succeed in such a defense, sound job analyses and job descriptions are needed, and the job qualifications stated should be validly related to the job (*Griggs* v. *Duke Power Co.*, 1971).

Discrimination under Title VII may be proved by a plaintiff through *prima facie* evidence (*McDonnell Douglas Corp.* v. *Green*, 1973). The burden of proof then would shift to the employer to "articulate some legitimate, nondiscriminatory reason" for the personnel action (*Texas Department of Community Affairs* v. *Burdine*, 1981). The burden of proof could shift back to the claimant to show that the reason offered by the employer was not legitimate, but a mere pretext (*Sweeney* v. *Board of Trustees of Keene State College*, 1979).

Title VII also requires that recruitment procedures and hiring interviews be conducted in a businesslike and nondiscriminatory manner. Advertisements should not refer to race or sex. Questions asked of a job applicant should focus on job-related matters, such as education and experience, rather than on race, marital status, or number of children.

The same concern for job-relatedness applies under Title VII to decisions regarding pay scales (*Kouba* v. *Allstate Insurance Co.*, 1982), evaluation, promotion, and separation from the job. All of these decisions should be justified by their relation to the job being performed, not by characteristics of employees such as race, sex, age, or handicap.

Comparable Worth. The theory of comparable worth deals with pay scales of female employees (*County of Washington, Oregon* v. *Gunther*, 1981). Comparable worth theory originally was based on Title VII of the 1964 Civil Rights Act. Now, however, several states have passed comparable worth laws.

The theory of comparable worth holds that a person should be paid what a job is worth per se, rather than on whether the

job is done by females or males. An illustration of a violation of comparable worth law could be a situation where women who operate word processors are paid at a lower wage scale than men who deliver campus mail. An employer then would be asked to justify the wage scale differential for the two jobs. To be successful in such a defense, an employer probably would be required to show job-related reasons for the wage scale differential. Acceptable reasons might be training required for the job, education, and experience. In the particular example given, the employer most likely would face a difficult burden of proof.

Claims based on comparable worth are to be distinguished from those based on equal pay. The *Equal Pay Act of 1963* requires that males and females doing substantially equal work should receive equal pay. Note that under the Equal Pay Act there must be females and males doing substantially the same job. Under Title VII's theory of comparable worth, females and males could be doing quite different jobs. Claims seeking redress based on comparable worth may allege that both Title VII and the Equal Pay Act have been violated.

Sexual Harassment. The definition of sexual harassment has been clarified by recent cases. Repeated incidents of physical touching or explicit sexual language in the presence of witnesses generally characterize these cases. Sexual harassment also may be in violation of criminal law and tort law.

Sexual harassment cases filed under Title VII need not show a loss of job benefits to be successful (*Bundy* v. *Jackson*, 1981). Males, as well as females, may file complaints alleging sexual harassment (*Wright* v. *Methodist Youth Services*, 1981).

Title VII would appear to place special responsibility on a chief student personnel officer regarding the development of a policy and sanctions against sexual harassment. Sanctions might include suspension or termination (*Loera* v. *State Board of Higher Education*, 1980). Having such a policy, and showing it is being implemented, is one way to avoid an adverse holding in court.

2. *Executive Order 11246, 1965, as amended* requires affirmative action if minorities and women are found to be underuti-

lized in the work force. Affirmative action plans have been found to be constitutional if they are "substantially related" to an institution's desire to remedy past discrimination (*Valentine* v. *Smith*, 1981).

3. The *Equal Pay Act of 1963* requires equal pay for equal work for females and males.

In *Dacus* v. *Southern College of Optometry*, 1981, back pay and an adjusted salary were awarded to a female employee who was discriminated against by being assigned substantially all the duties of the employer's male former business manager, plus the job of bookstore manager, but was paid less than the male former business manager.

4. *Title IX of the Education Amendments of 1972* prohibits sex-based employment discrimination in federally funded education programs.

A dispute existed over whether Title IX covered both students and employees. The United States Supreme Court held in *North Haven Board of Education* v. *Bell* (1982), that employees as well as students were covered, but that only specific programs receiving federal aid would be affected. *Hillsdale College* v. *Dept. of Health, Education, and Welfare* (1982) and *Grove City College* v. *Bell* (1982) also indicate program-specific interpretations of Title IX.

5. *The Age Discrimination in Employment Act (ADEA) of 1967* prohibits discrimination in employment against persons between ages forty and seventy. The principal focus of this law is that all employment decisions are to be made on the basis of merit and fitness, not age.

Under ADEA, a maximum hiring age for entry level deputy sheriff positions was disallowed (*Equal Employment Opportunity Commission* v. *County of Los Angeles*, 1981) but was allowed in another case, *Murnane* v. *American Airlines, Inc.* (1982), for airline pilots as a bona fide occupational qualification. Mandatory retirement prior to age seventy also has been allowed or disallowed depending on whether the requirements proved valid for specific jobs (*Equal Employment Opportunity Commission* v. *State of Wyoming*, 1982).

College or university rules sometimes conflict with state

laws. Where a state law required state employees to retire at age seventy, but the State University required retirement at age sixty-five, the State Supreme Court in *Levi* v. *The University of Hawaii* (1981) held that the state statute prevailed.

6. *The Rehabilitation Act of 1973* prohibits discrimination against handicapped persons. The law requires that job applicants and employees be judged qualified, or not, for jobs "in spite of their handicap," and that employers make *reasonable* accommodations for them. For example, a police officer who was paralyzed as a result of being shot was found capable of performing as many duties as were required of a number of other officers, even though he could no longer perform all duties of all officers. The court ordered the police department in *St. Louis County, Missouri* v. *Simon* (1982) to assign the paralyzed officer to a job he could do based on his physical capacity and his police experience.

Budget Management

Budget management is a high-risk operation in almost any organization. There may be criminal risks in addition to civil risks.

Criminal Liability

Criminal risks involve acts done with criminal intent. Forgery, larceny, and embezzlement are examples. Falsifying vouchers could be a criminal act (*State of New Mexico* v. *Ellenberger,* 1981). Each state has its own criminal code setting out what is a crime in that state.

Criminal penalties also exist for a deliberate, knowing violation of such statutes as the Fair Labor Standards Act and the Equal Pay Act, where the evidence reveals a criminal intent. Diverting funds to one's own use would probably be evidence of criminal intent.

Civil Liability

Civil liability may arise from various actions. Unauthorized persons sometimes order new equipment or sign purchase

agreements. The institution may repudiate the order or purchase, and even prosecute the wrongdoer; or under special circumstances, the institution may decide to ratify the order of purchase. A discriminatory use of budgeted funds may risk loss of federal financial assistance. Providing funds or other support for a male-only honor fraternity was found to violate Title IX of the Education Amendments of 1972 (*Iron Arrow Honor Society* v. *Hufstedler,* 1980; and *Iron Arrow Honor Society* v. *Heckler,* 1983).

A fiduciary duty probably exists in most instances where a chief student personnel officer controls monies. This may place a higher than usual standard of care on his or her behavior.

Protection of Funds

The chief student personnel officer would be well advised to make known to one and all that the student affairs office intends to abide by the highest professional standards regarding the accountability of all personnel for the handling of monies and accounts. Should there be an *accusation or appearance of a misuse of funds,* the chief student personnel officer has the responsibility to act fairly but swiftly. Otherwise he or she may be deemed to have condoned the act or be involved somehow. The best practice is to arrange for an immediate accounting of the funds in question. If large sums are involved, the individuals who normally handle the funds may be asked to do different work until an investigation has been completed. The sooner persons' names are cleared, or the culprit identified, the better for all concerned.

The chief student personnel officer should make sure that all new employees understand before they are hired how such investigations will be handled. A procedure for so advising prospective employees and for handling investigations should be worked out with the advice of legal counsel. The goal is to protect both reputations and monies.

Special emphasis should be placed on the fact that student monies, student organizations, and student employees are closely involved with an office of student affairs. Students should be able to see the operation of this office, in particular, as exemplary.

Policy Development

Proper development of policy is essential in tempering risks. Generally an institution, through its governing board and chief executive officer, develops a number of policy statements on various matters.

Content of Policy Documents

First and foremost, policy documents should be absolutely clear about the authority to act that has been delegated to each level of administrative employee.

The chief student personnel officer would want to be certain that policies are developed regarding employment terms and conditions, particularly regarding the review of adverse employment decisions. Equal employment opportunity policy statements are especially critical. Policy regarding the handling of funds should be included. Student disciplinary policy is another necessity.

The intent of the institution to abide by nondiscriminatory statutes, to meet safety regulations, to provide appropriate due process, and to support an atmosphere in which teaching and learning may flourish, should be set forth in its policy documents.

Preparation, Dissemination, and Review of Policy Documents

Policy documents should be clearly written, disseminated widely, and reviewed regularly by legal counsel. Rules and regulations implementing policy often appear in handbooks, which require the same careful development, dissemination, and review.

Staff Practices

Tort liability for negligence is a common risk that arises from staff practices. A tort generally is defined as a wrongful act, except a breach of contract, that may occur between individuals. Usually, a tort is a negligent act, that is, improper care by one

individual that causes foreseeable injury to another. Where foreseeable danger exists, proper care and warning must be given.

Negligence. An injured party must show the following to prove negligence: (l) that the institution or individual owed the injured party a duty of care, (2) that there was a lack or breach of care, (3) that an injury was suffered, and (4) that the injury was the direct result of the lack of care.

Examples of Negligence. Slip-and-fall incidents often are caused by negligence and result in liability for the injury suffered. They also provide good examples of negligence. Failure to see that ice on walks or stairs is removed, or spills cleaned up, are common causes of such injuries (*Poulin* v. *Colby College,* 1979; *Rogers* v. *Hennessee,* 1979).

Neglecting to give warning of known danger could amount to negligence. Where, for example, an institution knew of past assaults on students in one of its dormitories, but represented the campus as safe and failed to warn new residents or install safety devices, and later a resident was raped and murdered, the court held in *Duarte* v. *State of California* (1979) that there could be liability for negligence.

Negligence was found in *Tarasoff* v. *University of California, Berkeley* (1976) where a campus psychologist who was counseling a student client learned that the student client had threatened to kill another student. The counselor failed to warn the intended victim, who was, in fact, later killed.

In *Jesik* v. *Maricopa County Community College District* (1980), negligence was found where a student standing in line for registration was threatened by another student and informed the security guard of the threat. The security guard gave no special care or protection, and the first student was later killed by the other.

There are many possibilities for negligence in the varied activities under the direction of a chief student personnel officer. Employees may be injured by machinery known to be malfunctioning, or by an unmarked excavation known to constitute a danger.

Who Is Liable for Negligence? Usually, the institution would be liable for payment of damages in negligence cases. But if the chief student personnel officer or others on the staff knew of a dangerous condition and took no steps to give proper warning or alleviate it, they could be sued individually as well. Both the institution and individual officers and staff could be liable if the injurious act were done within an individual's scope of authority or employment. However, where an individual acts negligently or outside the scope of authority, such as unexpectedly playing a prank that results in an injury, the individual alone may be liable and have to pay any award of damages out of personal funds.

Insurance, indemnification, and releases of responsibility should be utilized for protection against damages to the extent possible.

Defenses to Claims of Negligence. There are a number of defenses that may be used to defend charges of negligence. Student personnel officers should be aware of these defenses:

1. *Assumption of the risk* is one of several defenses to claims of negligence. It takes into account that an injured party knew of the dangerous situation and voluntarily took the risk. An athletic coach would be deemed to have assumed the normal risks of a sport. However, an unrelated risk, such as an unrepaired live electric wire lying across the walkway between the locker room and the sports field would not be a normal risk associated with a sport.

2. *Contributory negligence* is another possible defense. Were a staff member to behave in such a manner as to contribute to the injury he or she suffered, the amount of damages awarded probably would be reduced, or no award would be made. For instance, if a staff member knew that a bookcase was cracked and ready to topple but failed to report it, and if it fell over and he or she was injured, the court may well consider evidence of contributory negligence in the case.

3. Public institutions may be protected by the *doctrine of sovereign immunity,* which holds that a government may not be sued without its consent. It should be noted that a number of states have consented to suits for tort liability by passing legislation to that effect. Even where governmental immunity still is in effect, a court may find that the actions causing the injury were proprietary, not governmental, and therefore no governmental immunity exists. Examples of proprietary acts would be jobs performed by doctors and nurses in a university hospital, or jobs connected with big league college football.

4. *Other defenses* may involve coverage by worker's compensation, or untimeliness due to a statute of limitations.

Defamation of Character

Injury to a person's reputation also may be the result of a tortious act. Defamation of character by libel or slander would be an injury for which a person may sue to recover damages. For instance, were a campus newspaper to print a story falsely accusing an employee of forging travel vouchers, a lawsuit may be filed alleging injury to the employee's good reputation. Personnel committees that make proper use of defamatory information within the confines of the committee generally are protected from defamation claims (*Stukuls* v. *State of New York,* 1977), but improper use of such information may result in liability (*Colson* v. *Steig,* 1980).

Other Forms of Tort Liability

Other forms of tort liability include reckless conduct, fraudulent misrepresentation, invasion of privacy, and emotional distress.

Management of Campus Auxiliary Services

A chief student personnel officer who has responsibility for the management of campus auxiliary services needs to be aware of

at least the following risks: breach of contract with students or other users; tort liability for injuries due to negligence; financial accountability for misuse or mismanagement of funds; thefts; and even charges of discrimination. Local businesses, too, often complain that bookstores, food services, and other similar services are in unfair competition with them.

Risk of Contracting out Services

Many institutions contract with outside firms to run some auxiliary services. If that is the case, the chief student personnel officer should insist that a tightly drawn contract be negotiated with the outside firm. The contract should be explicit regarding what services the outside firm has been hired to perform, whether employees work for the outside firm or for the institution, what insurance or indemnification is in place, how the contract may be terminated prior to its expiration date, what penalties there are for nonperformance or poor performance, and how security will be handled.

Academic and Administrative Relationships with Faculty

A chief student personnel officer must have clearly in mind the parameters of the student affairs office vis-à-vis the academic affairs office. Where a situation appears to overlap the two offices, a mechanism should be in place to handle it.

Student and faculty handbooks should make clear which student and/or faculty behavior is subject to scrutiny under a disciplinary code and which would come under academic review.

Student Discipline Procedures

Due Process

Due process is a constitutional right of students at public institutions (*Tinker* v. *Des Moines Independent School District*, 1969). It is not in most instances a constitutional right of students at private institutions. However, private institutions may choose to grant students a right to due process by including it in

their student handbooks or in other documents. If so, due process may become part of the student's contract of enrollment. Then, to refuse to provide due process to students at private institutions would constitute a breach of contract, though not a deprivation of a constitutional right.

Due process is defined in broad terms by court cases. Generally, it means telling the student what the charges are and hearing the student's side of the story in determining whether or not the student violated the rules. Thus, at the minimum, students facing suspension or expulsion for a violation of the disciplinary rules should have notice and a hearing. The hearing should take place before the sanction is ordered, unless there is an emergency involving danger to persons or property (*Goss* v. *Lopez*. 1975).

Academic Failures Distinguished from Discipline Problems

A distinction has been made by courts between violations of a disciplinary code and failing to meet academic standards. The Supreme Court established in *Board of Curators of University of Missouri* v. *Horowitz* (1978) that due process is not required for determinations that a student has failed to meet academic standards. Where there is evidence of malice or arbitrariness, some form of review should be available to determine whether the grade was based on course work or on some unrelated, nonacademic reason.

Civil Rights Liability of the Chief Student Personnel Officer

A chief student personnel officer at a public institution who *knew or reasonably should have known* that an action (such as a disciplinary suspension or expulsion taken within his or her sphere of official responsibility) would violate the constitutional rights of the person affected, may be liable *personally* for damages (*Wood* v. *Strickland*, 1975). The person affected would be required to offer proof of damages, such as damage to reputation, illness, or monetary loss. If no damages were proved, the award would be nominal, perhaps one dollar (*Carey* v. *Piphus*, 1978). It is essential, therefore, for a chief student personnel officer to assure that if due process is required, it is provided.

Recommended Risk Management Practices

In order for the chief student personnel officer or any other student affairs officer to adequately assume the special risks that accompany the role of employer and manager, the following risk management practices are urged.

1. A chief student personnel officer should understand the scope of his or her authority and be objective and reasonable in making decisions related to the running of the office.
2. Legal requirements of the office should be understood and followed. Legal counsel should be consulted prior to taking questionable action.
3. Good management practices should include accurate job analyses and job descriptions, as well as job qualifications that clearly are related to the job.
4. Employment practices, from recruitment to termination, should be reviewed to assure that they are nondiscriminatory.
5. Contracts with employees should be clear and unambiguous, and understood by employer and employee.
6. Institutional documents dealing with terms of employment should be reviewed, updated, and disseminated.
7. Evaluations of employees should be done regularly so that personnel files will reflect accurately the reasons for adverse decisions.
8. The exercise of constitutional rights, where they exist, should be protected, and not become the basis for adverse employment decisions.
9. Reasonable care should be taken to prevent foreseeable injuries on campus.
10. High standards of accountability for monies and other budget management functions should be emphasized.
11. Policy should be reviewed regularly and changes made to reflect new legal requirements.

12. Student discipline procedures should meet appropriate due process standards and be available to all on an equal basis.

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CHAPTER FOUR

The Residential Campus: High-Risk Territory!

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By its very nature, the residential campus presents unique risks for the student affairs administrator. Since students live on the campus as well as attend classes and use academic facilities, the problems that student affairs administrators confront on the residential campus are numerous and complex. Such diverse topics as the rules and regulations governing the residential campus, staffing for residence halls, programs and activities, physical facilities, and special issues associated with Greek letter organi-

zations provide the student affairs administrator on the residential campus with unique challenges.

The purpose of this chapter is to address selected issues (not all the issues) pertinent to the topics listed above. It attempts to discuss some of the more significant issues of the five topics, cite relevant case law, and recommend practices student affairs administrators might employ to minimize the risks associated with each of the topics.

Rules and Regulations

Normally, a myriad of rules and regulations govern the conduct of daily activities in residence halls and on residential campuses. These rules usually are established by the institution's governing board, after having been developed by the student affairs and housing offices, university committees, and where appropriate, individual residential units. An excellent discussion of rules and regulations in general was written by Van Alstyne (1968). Four categories of rules and regulations typically govern residence halls, and this portion of the chapter will address them.

Mandatory Residence

During the late 1960s and early 1970s regulations requiring that students live in residence halls for a specified period of time were debated in the courts. Reasons given by institutions for mandatory housing requirements ranged from the supposedly enriched educational atmosphere of residence halls to financial problems. On the basis of several cases, one can conclude that students may be required to live in residence halls under certain conditions.

Colleges and universities that require students to live on campus for purely financial reasons appear to be a bit more vulnerable than those that incorporate educational reasons into their mandatory living requirements. In *Prostrollo* v. *University of South Dakota* (1974) and *Schick* v. *Kent State University* (1975) financial exigency was a portion of the institution's rationale for

requiring students to live on campus; nevertheless, the most accepted and viable reason for mandatory residence in public institutions remains the educational benefit.

An education-based reason for requiring students to live on campus is not difficult to develop, given the research that has been conducted on the effect of residential living on students during the past fifteen years. These studies, listed in Chickering (1974), Astin (1978), Bowen (1978), and Schuh (1980), concluded that positive educational outcomes resulted for students who lived on campus. Thus, if a mandatory residential requirement is desired, the fundamental response for instituting or maintaining such a requirement should be for educational reasons. On the other hand, those developing this rationale should be aware of at least one study (Levin & Clowes, 1982) that did not confirm an independent effect of residence hall living on educational progress.

Search and Seizure

One of the fastest ways for a college or university to find itself faced with litigation is for the search and seizure of items in residence hall rooms. Usually these situations develop as a result of some sort of disciplinary or police action involving the seizure of contraband items (narcotics, paraphernalia, alcoholic beverages, or stolen property). Unless the situation is handled in accordance with institutional regulations and constitutional guarantees, significant problems can result.

The question of search and seizure was a hotly debated issue during the late 1960s and early 1970s. Several guidelines have been developed that can provide assistance for these kinds of situations. The institution should reserve the right to allow staff to enter rooms for specific, stated reasons, such as to inspect for safety reasons or make repairs. Entering rooms for reasons of rule enforcement should be done only under the strictest guidelines, and then only in accordance with accepted case law.

Bracewell (1978) pointed out that cases involving search and seizure can be divided into two categories: those situations where evidence is seized to be used in criminal prosecutions, and those situations where that which is seized is used in disci-

plinary proceedings on campus. It seems clear that in those situations where evidence is seized for criminal prosecutions the Fourth Amendment will govern the situation, i.e. police must have a search warrant. These kinds of situations seem to be most clear.

On the other hand, seizure of items to be used in disciplinary proceedings on campus are a bit more complicated. Nevertheless, three cases (*Piazzola* v. *Watkins*, 1974; *Smyth* v. *Lubbers*, 1975; and *Morale* v. *Grigel*, 1976) all reinforce the concept that college or university officials are reasonably tightly bound to the concept that they may not enter students rooms to conduct search and seizure except under strictly controlled situations. On the other hand, *State* v. *Kappes* (1976) pointed out that discovering and seizing illegal drugs during a normal maintenance inspection is not a violation of the Fourth Amendment. Perhaps the most cogent guideline for entering students' rooms was suggested by Bracewell (1978, p. 33), who argued "Certainly the creation of privacy for individuals in our society and protecting this privacy is not contrary to the objectives of our educational institutions." In the final analysis, then, it seems to make the most sense that college or university staff should not enter student rooms for the purpose of conducting general searches. What might be gained by apprehending contraband from an occasional student offender pales when compared with the general effect of such searches on student morale.

Sales and Solicitation

In a period of a less affluent economy, residence hall students have become an attractive market for goods and services. A number of organizations have become interested in soliciting business on campus from students who live in residence halls. An excellent discussion of commercial activities on campus was written by Gibbs and Jernigan (1980) and is worth reviewing. Several recent cases have been heard that give institutions the right to limit access to residence hall rooms.

In both *Brush* v. *Pennsylvania State University* (1980) and *American Future Systems, Inc.*, v. *Pennsylvania State University* (1980), the university was challenged over its regulation against

sales and solicitation in residence halls except under strict guidelines. In each case the institution's position was upheld; namely, Penn State can restrict access of commercial vendors to residence halls. A further challenge (*American Future Systems* v. *Pennsylvania State University,* 1982) resulted in findings by the court that instructed the university to permit some forms of commercial activites in the residence halls. Since sales and solicitation regulations are being challenged, the prudent housing officer should review institutional rules with counsel in light of current judicial decisions. A recent regulation at the University of Wisconsin-Madison (*Chronicle of Higher Education,* March 24, 1982) takes the institution's position a step further. In this situation, groups with religious, political, and commercial purpose will be barred from going door to door in the residence halls. The institution, however, will allow the groups to have access to lobby areas.

State constitutions may have some influence on how institutions may regulate religious activities. A particularly useful discussion of students and religious activities on campus was written by Jones (1981). For example, the constitution of the State of Indiana makes it very difficult to prohibit door-to-door canvassing by religious organizations. Therefore, several guidelines should be considered in managing this kind of activity.

Institutions should have a set of regulations for solicitation that should be issued to all organizations wishing to solicit in the residence halls or in other campus areas. The rules should be straightforward, i.e., discuss when study hours are in effect and what visitation guidelines govern access to living areas of the halls. The rules should describe how a permit to solicit may be secured and what the limits of the permit are, including the number of days the permit is in effect and under what conditions it may be revoked. It is clear that prohibiting solicitation by profit-making institutions may be accomplished under certain circumstances, but the limitations placed on religious or political organizations that desire access to student rooms may be less stringent. On the other hand, the case of *National Movement for Student Vote* v. *Regents of the University of California* (1975) is an interesting one because in this instance a regulation prohibiting

door-to-door canvassing in a residence hall for voter registration was upheld. However, it appears that prohibiting religious organizations from using campus facilities cannot be done *(Chess* v. *Widmar,* cited by Fields, 1981).

Fire and Safety Regulations

There is no greater problem for residence hall administrators than those issues associated with fire and safety regulations. Specific recommendations regarding the upkeep of facilities are listed elsewhere in this chapter, but several thoughts regarding fire and safety are worth considering.

If an institution is located in an area of high crime or there is repetition of serious incidents that might jeopardize the safety of students, then steps must be taken to protect students. Definition of what these steps might be will be determined by the nature of the incidents, but it is advisable to bring in a recognized expert who can make recommendations about security. Obviously, if the institution has a series of incidents regarding personal safety, i.e., assaults on campus, thefts, etc., and it fails to take measures to protect students, it could be liable for damages *(Duarte* v. *State,* 1979).

Just as criminal incidents pose a threat to students, so do the effects of weather and natural disaster threaten students' well-being. All colleges and universities should have major disaster plans to deal with the effects of tornadoes, hurricanes, floods, severe cold, or other hazards indigenous to the region of the institution. These plans should be reviewed annually, and staff should be aware of their specific responsibilities in each kind of disaster before the residence halls open for the fall term. Student residents should be informed as to their potential courses of action if a weather-related emergency is imminent. Disaster planning should be a continous process with local community officials so that every conceivable exigency is addressed.

Perhaps the greatest single danger in a resident hall is that of fire. Some of the recent fires in high-rise hotels graphically illustrate the potential danger created by a fire in a residence hall. Many states have laws regarding fire drills, fire fighting equipment, smoke detectors, and other fire disaster equipment.

Residence hall administrators must be conversant with these laws. Close coordination between the resident life staff and the university environmental health and safety personnel is mandatory. Fire wardens should be appointed to assist staff in evacuating buildings during fire disasters. Drills should be held regularly, and misuse of fire fighting equipment and fire alarms should not be dismissed as pranks and ignored. Routine inspections should be conducted in kitchens, incinerators, and other areas of the buildings that are particularly dangerous. By following these steps the potential for fire hazards will be minimized.

Rules and Regulations As Applied to Private Institutions

To a certain extent, private institutions have more latitude in establishing and carrying out rules and regulations than do public institutions. For example, in *Miller* v. *Long Island University* (1976) a student's housing contract was terminated by Long Island University without formal charges and a prior hearing. The court supported the institution's actions in this litigation.

With regard to establishing mandatory residence requirements, private institutions simply may do so if such is their wish. While such a policy might be challenged if it were applied arbitrarily to some students but not to others, it would be much more difficult for a student to successfully challenge such a requirement on the basis of its rationale, i.e., for fiscal or educational benefits, than at a public institution.

Search and seizure is another area where private institutions might have a bit more latitude than public institutions. It is entirely possible that for the purposes of institutional disciplinary actions, searches of student rooms could be conducted under less stringent conditions in a private institution than in a public institution. For actions by commissioned police officers, the guidelines would be the same at both public and private institutions.

Private colleges and universities also may find it less difficult to restrict access to outside organizations for the purpose of sales and solicitation. Whereas public institutions have been challenged successfully in limiting access to living areas such as residence hall rooms, private institutions would have a much

better opportunity to be successful in prohibiting profit-making organizations from conducting any business on campus without specific institutional permission.

As was suggested in *Miller* v. *Long Island University* (1976), the requirements for due process in judicial hearings conducted at private institutions are much more limited than is the case at public institutions. While the guidelines for judicial hearings are highly structured at public institutions, private institutions may conduct judicial actions without guaranteeing due process to the student offender. Although failing to provide for due process might be questioned by some as poor educational practice, such an approach by private colleges has a much better chance of being upheld by the courts than if it were conducted at a public institution.

Staffing

Residence halls are unique on college campuses because they are staffed essentially by students, and the annual staff turnover frequently exceeds 50 percent. As a result, the halls are staffed by minimally experienced students; this is in direct opposition to the remainder of the campus, which is usually staffed by full-time, experienced personnel. As a result, the opportunity for risk in this area of residence halls is great.

Selection

With such large turnover of staff each year, staff selection is a major undertaking. Students frequently see resident assistant positions as particularly attractive, since the jobs are performed in the locus of residence and the experience can be very compatible with academic work. While the demands of the job can be great, serving as a resident assistant can provide a real opportunity to "grow, to learn, and to experience resonsibility in a working situation" (Blimling & Miltenberger, 1981, p. 2).

Several guidelines should be followed when selecting resident assistants. Initially, the college or university should keep in mind that this is the first professional type of position that many

applicants seek. As a result, they will have little understanding of how an appropriate hiring process should be conducted. Therefore, the process should be seen as a learning experience for all participants, not just for those who are selected.

The hiring process should be well advertised far in advance of the actual deadline for application. Such mechanisms as the campus newspaper, the campus radio station, campus bulletin boards, and other media should be utilized in notifying students that applications are being accepted. Special efforts should be made to invite members of historically excluded groups to apply. These efforts might include meeting with leaders of such groups, presenting programs to the membership of the group, and perhaps extending special invitations to individuals. If the percentage of historically excluded group members on the present resident assistant staff is less than the percentage of such people who reside in the residence halls, a potential problem exists.

The job description for the position and the hiring process should be clear. Job responsibilities are stated best in terms of behavioral objectives. The application should be simple, and reference forms should be sought from individuals who have an understanding of what the position entails, such as current resident assistants. The hiring process should include collaboration with student interviewers so that a broad base of consultation in the hiring process is solicited.

Ultimately, those individuals chosen for the positions should be those who are the best qualified. It is entirely possible that some students who are not selected will raise questions as to why they were not chosen. To address such concerns, it is critical that complete files are developed on all applicants, including application forms, references, and interview notes. Specific reasons for individuals not being selected should be sought from those who make that decision. With such information in hand, a conference can be conducted with a student explaining why he or she was not selected. Incomplete information or unsubstantial reasons will cause problems for the administrator responsible for the hiring process.

Supervision

After staff persons are selected and have gone through a training process, careful supervision is necessary. Elsewhere in this chapter there are some remarks about the initial training of staff. It should be reiterated, however, that staff should be prepared for common emergencies *prior to* the opening of the residence halls for the fall term. Some of these emergencies might include fire prevention, safety procedures, liaison with police services, and first aid.

Supervisory personnel can be held liable for the actions of staff. The most dramatic case is that of *Jones* v. *Wittenberg University* (1976), where a campus police officer accidently shot and killed a student while attempting to warn the student. The evidence in the case suggested that the individual should not have been a police officer and that the university was negligent as a supervisor.

One might conclude from this case that continuous supervision in terms of the fitness of staff to hold their positions is necessary. While supervisors cannot be everywhere, it is clear that they have an obligation to carefully select, train, and supervise staff so that institutional expectations for the job are followed carefully. Routine evaluations of staff will help in this sort of activity (Miller & Schuh, 1981).

Liability

Student personnel staff are not immune from the multitude of lawsuits that are filed in higher education (Young, 1978). In many ways residence hall staff are more vulnerable to such suits because most staff are inexperienced students and resident students spend more of their time in residence halls than any other place on campus. Two aspects of liability are worthy of discussion in this section of the chapter.

As is pointed out elsewhere in this chapter, when staff are aware of problems in the residence hall, they have an obligation to correct a potentially hazardous situation. The test for whether or not staff should be accountable for the problem may hinge on two points: either the staff member knew of the potentially hazardous situation or should have known of the problem. This test

is an addendum to an 1871 Civil Rights Act, and it adds additional teeth to the law (Young, 1978; *Wood* v. *Strickland*, 1975).

The concept of confidentiality is often misinterpreted by staff, and should be defined specifically for them. Resident assistants, particularly, believe that just because a student has asked them to keep some information confidential, they must do so. Such is not always the case.

The case of *Tarasoff* v. *Regents of the University of California* (1976) provides an excellent illustration of a situation where confidential information should have been released. In this situation a threat toward a third party was made by an individual to a therapist. The bounds of confidentiality were respected by the therapist. At a later date the third party was killed. The court found in favor of the parents, who argued that their deceased daughter should have been warned of the impending danger. Therefore, the dynamics of this case can be utilized to point out to resident assistants that if they are aware of impending danger to an individual they should seek help immediately and abandon the "privileged" communication. This concept might be extended also to those situations where an individual threatens to commit suicide. The resident assistant would be better advised to have an individual angry because of broken "privileged" communication than to have to deal with the ramifications of a student death in the unit.

Personnel Policies

Most resident assistant staffs are coeducational, that is, both men and women serve on the staff in units throughout campus. Only those institutions with housing for just men, or just women, would be immune from this concept. As a result, questions will arise about the treatment of staff. Should women be treated differently from men? Should they assume the same kinds of risks?

The single most important factor guiding personnel policies for resident assistants is that all staff should be treated equally. They should receive the same pay, they should have the same responsibilities, they should be supervised in the same way, and they should be selected using the same process. Any deviation

from equality in the workplace likely will result in serious problems for the department. The Department of Labor has developed some handy pamphlets on discrimination in the workplace that are easily obtained (United States Department of Labor, 1973) and very useful in developing practices for an equal employment workplace.

Programs

Such activities as X-rated movies, wet T-shirt contests, trips to exotic places, and social activities focusing on the use of alcoholic beverages challenge the administrator to devise ways of minimizing institutional risks and liability. This portion of the chapter will address selected issues regarding student programming in residence halls.

Supervision

Perhaps the most notable recent case regarding student programming is *Bradshaw* v. *Rawlings* (1979), which has been widely discussed in the literature. In spite of the fact that the institution was absolved of financial responsibility for injuries suffered by Bradshaw by the United States Court of Appeals, a lower court found for Bradshaw and assessed damages to the institution as well as several other defendants. This case has caused a number of institutions to reevaluate the question of supervising of student activities.

Initially, the use of institutional funds to purchase alcoholic beverages should be avoided. Defining what constitutes institutional funds may be difficult, but the best way to avoid problems is to define the term as broadly as possible so as to include even those funds which are remotely associated with the institution, such as social fees collected and expended by residence hall student government. If students must have alcoholic beverages as part of a social activity, they should supply the beverages themselves, or buy them from the host establishment, i.e., bar, restaurant, etc. Institutional policy should prohibit the use of institutional funds to support an activity where alcoholic beverages

likely will be consumed by minors. For example, if a residence hall floor is going to have a party at a union hall it may wish to use social fees to pay for the rental fee of the hall and snacks. If an admission fee is collected at the door to pay for alcoholic beverages, the institution should not allow the expenditure of social fees to support any portion of the event. Moreover, the institution should not allow the activity to be scheduled as an "official" event on the institution's calendar. In short, the institution should put as much distance as possible between itself and the event so that if a question of liability arises later, it can be shown that the event was simply a group of students who elected to gather rather than a sponsored event by an official university organization.

Staff should not help organize or agree to supervise any event which is contrary to law. For example, if an event is going to be held where underage drinking will take place, staff should not be a party to organizing or supervising the event.

One other thought should be shared regarding supervision. When programs are hazardous or dangerous to participants, the institution probably has a responsibility to inform participants of the risks they may be taking as a result of participating. One case in particular, *Gross* v. *Sweet* (1978), is instructive in this area. A participant in a parachuting school took a risk outside of FAA regulations without warning by the school. He suffered a broken leg and sued the school for not warning him of the danger. The court found in his favor and awarded a settlement. On the other hand, when adequate and reasonable precautions are taken by the institution, the court probably will find for the institution (*Mintz* v. *State*, 1975). Thus, such activities as skate boarding contests, amateur boxing tournaments, and tugs-of-war should be planned with great care or serious ramifications from injuries could result (Miller & Schuh, 1981).

Fees

Excellent discussions of student fees were prepared by Strope (1980) and Phillinger (1982). Institutions appear to have the right to collect fees, and in fact can collect them on behalf of student governmental organizations, such as residence units.

The question that seems to be of greater concern is not the collection of fees but rather the expenditure of them.

Obviously, the first question that should be asked regarding the expenditure of fees is whether or not the expenditure is for legal purposes. If students wished to buy alcoholic beverages for minors using their student fees, clearly such a purpose would be illegal and should be denied by the institution.

Not all expenditures are quite so blatantly incompatible with the institution's objectives. Some may be more subtle and can cause great anguish for the administrator. For example, suppose a student group using institutionally collected residence hall dues wished to visit a massage parlor. Assuming that the massage parlor operated within the laws of the state and municipality, there is nothing illegal about the trip, although some may consider it revolting, degrading, and immoral. One can hope in situations like this, appeals to the better instincts of students will have the desired results of having the trip cancelled, but students still may take the trip. It is entirely possible that from a legalistic point of view, the institution may not be able to stop the activity. Strope (1980) did point out that funds generally can be expended for any activity determined by the institution and its board to be reasonably conducive to carrying out the general purposes of the institution. He pointed out that the roadblocks to stopping funding for specific events revolve around the equal protection clause of the Constitution and the First Amendment.

In the final analysis, dispensation of funds for questionable events will be limited to a certain extent by the federal constitution, state constitution, local ordinances, and how willing the administration of a given college or university is to risk a lawsuit over a given issue. In some cases, while losing the suit may be a foregone conclusion, it is possible that certain public relations value can be gained by trying to prohibit the expenditure.

One other area of expenditures worth reviewing is one where students wish to sponsor a speech or other gathering (like an X-rated movie) which the institution may deem not to be in its best interests. In the case of speakers, state laws and institutional regulations generally have been found to be unconstitutional on the basis of a prior restraint of speech (Tanner, 1978). With

regards to X-rated movies, community standards generally determine what is acceptable on campus. If X-rated movies are shown in movie theaters in the community in which the campus is located, it would be very difficult for the institution to make a case that it could ban the movie on the basis of community standards. In situations like these, skillful negotiations between administrators and students usually can minimize the public relations damage caused by the event. If the event is held on a weekend when there is low activity, i.e., no home football game, special recruiting of high school students, or parents' weekend, the damage can be reduced. Additionally, it is possible to negotiate a limited advertising campaign with students regarding the event, i.e., no ads placed in newspapers other than the campus daily, and no radio or television promotions. Trying to manage this kind of event so that the amount of publicity is minimized is probably the most reasonable course of action, rather than trying to stop the event, which can turn it into a free-speech issue resulting in excessive publicity with the event ultimately occurring anyway.

Special Issues

Two special issues are worthy of comment. One is Title IX of the Educational Amendments of 1972, and the other is Section 504 of the Rehabilitation Act of 1973.

Title IX prohibits sex discrimination in education. While Title IX is thought of frequently in the context of intercollegiate athletics, there are several implications for residence halls. These implications center around equal rules and regulations for men and women.

There was a time when different hours for visitation existed for men and women, as well as different rules for curfew, dress, and mandatory residency. Often these rules were designed to protect women from potentially risky situations. Put succinctly, Title IX makes different regulations for men and women illegal. If a campus has different regulations for men and women regarding student housing, it would be well advised to bring such regulations into line so that all regulations regarding men and women are the same. Anything short of such congruence could

cause problems for the residence hall administrator.

What Title IX did for women, Section 504 does for the handicapped. In the context of student housing, 504 insures that programs and activities are accessible to qualified handicapped people and that the institution must provide barrier-free access for qualified handicapped persons to all programs and activities. While every facility need not be completely accessible, each program or activity must be accessible when viewed in its entirety (Moore & Jones, 1978).

Given such direction by Section 504, it is clear that there are several implications for the residence hall administrator. Initially, facilities should be modified so as to be accessible to qualified handicapped individuals. One interpretation is that not all buildings need to be accessible, but every building that has a unique program must be accessible. Therefore, if there are no special programs in any residence halls (i.e., all of the halls are the same), not all would have to be modified for access by the handicapped. But in situations where special programs are conducted, such as language houses, living-learning centers, or other thematic housing, these units would have to be modified because they are unique programs. Since no funding has been provided for physical modifications to facilities by the legislation, it is clear that such changes could be burdensome in a fiscal sense. Nonetheless, the prudent administrator will develop plans for making sure that all programs are accessible to qualified handicapped individuals.

Physical Facilities

Maintaining physical facilities is a challenging task for residence hall administrators. Students usually do not care for residence hall facilities as well as they might for their rooms at home, and since there is less supervision in a residence hall than at home, facilities can deteriorate to a certain extent regardless of how well the custodial staff keeps them. A myriad of potential problems can arise in residence hall facilities, including everything from a pipe bursting in a room to an accident suffered by a student who breaks an arm tumbling on an icy step.

Facility Maintenance

The cost of maintaining physical facilities has skyrocketed over the past decade. There is a strong temptation for administrators to cut corners in the upkeep of facilities by deferring maintenance from year to year or reducing the number of maintenance staff. While such actions may provide some short-term relief for beleaguered budgets, the long-term ramifications may not be cost effective. The case of *Shannon* v. *Washington University* (1978) illustrates the point. In this situation a student slipped on what appeared to be a cleared area of sidewalk. In fact, the sidewalk was covered with ice. The university presented two arguments, neither of which was sustained by the court. First, the institution claimed that it did not have sufficient time to clear the sidewalk. Second, the university claimed that the student was negligent since the condition of the sidewalk should have been obvious. The court, however, found in favor of the claimant by ruling that the university should have had the sidewalk cleared of ice and that a reasonably prudent person would not have known that the walk was covered with ice (Miller & Schuh, 1981).

The findings of Shannon suggest several implications for the residence hall administrator. First, a hazard created at a time when it is inconvenient or expensive to correct it does not relieve the institution from its obligation. If pipes burst on a weekend and flood a floor of a residence hall, the instituion will have to take reasonable steps to repair the damage as expeditiously as possible. Second, institutions should be able to make prudent decisions about what constitutes a hazard. At first glance, sand candles seem relatively harmless, but when they are placed on a window sill in a residence hall, the potential for a fire becomes great. If the wind blows a candle over, the fire can spread and cause a potentially great emergency. Third, when the institution becomes aware of a problem, such as through a student reporting a problem to a resident assistant, there is an obligation to take immediate action to correct the problem. If a student indicates to a housekeeper that the floor of a shower room has become covered with glass because somebody dropped a bottle of shaving lotion, and the glass is not cleaned up promptly, inju-

ries incurred might result in a liability action against the institution and perhaps a staff member.

Several steps can be taken by institutions to limit their risk in dealing with facilities. First, potential risks (i.e., icy sidewalks) should be corrected immediately. While institutions have a narrow margin of time to correct problems, as *Mortiboys* v. *St. Michael's College* (1973) and *Freed* v. *State University of New York* (1975) point out, it is incumbent upon colleges and universities to take prompt action in these situations. Second, institutions should be able to anticipate potential risks, as was the case in *Mississippi Power and Light Company* v. *Johnson* (1979), and *Jesik* v. *Maricopa County Community College District* (1980). As staff become aware of potentially dangerous situations, they have an obligation to address the situation immediately. Third, when dangerous situations are reported by students or other interested parties, prompt action should be taken by the institution. The reader is referred to *Duarte* v. *State* (1979) for an example of an institution's responsibility to protect residents. In this case action was sought against the university because it allegedly failed to remedy an unsafe situation on campus. The court found that the institution had to take reasonable steps to provide for student safety.

Damage Deposits

Typically, institutions charge some kind of fee to students which, in effect, is a contract binder. Sometimes the fee is a prepayment of rent, while at other times it is a damage deposit that is refunded to students at the end of the year if no damage charges are incurred. Much discussion has resulted during the past several years about these deposits. The discussion revolves around several areas.

If a deposit is charged for the ostensible purpose of serving as a guarantee of occupancy, the money should be dedicated as a prepayment of rent, should be applied to the room rental, and should not be considered as a damage deposit. While institutions might be challenged regarding a fee charged to students that potentially will be refunded (like a damage deposit), a prepayment of rent simply accelerates the collection of money that

will belong to the institution in any case. It is preferable to charge a prepayment of rent as a contract binder rather than using a damage deposit for that purpose.

The amount of the deposit can be resolved, to a certain extent, by the amount of the rent charged. Simply, the institution might charge one month's rent in advance, on a nonrefundable basis, which could be applied then as the last month's rental fee, assuming that the student does not break the contract. In this way, the institution serves much like a commercial vendor, where it is very common that the last month's rent is charged to a dweller in advance of occupancy.

Damage

If damage deposits are not collected from students, how are the costs of damages to be borne by students? This issue can be addressed in several ways. The simplest way is to determine the annual cost of damages to facilities, and then build that charge into the individual room rental fee. For example, if the annual cost of damages is $5.25 per student, then $5.25 of the rental fee should be dedicated to damage costs. While this method does not serve the educational mission of residence halls, i.e., teaching students about the costs of living, it is the simplest and most easily defensible method of handling these costs. Many facilities used by the general public, whether operated in the private or public sector, handle damages this way. Airports, bus stations, restaurants, etc., do not assess specified damage charges to patrons. Rather, the cost of goods and services are established with the cost of damage and vandalism built into the fee or charge.

If students are charged for damages, several guidelines should be employed to keep the process as smooth as possible. When individuals can be identified as being responsible for damages, they should be charged. This procedure seems simple enough. There are times, however, when students seem responsible for the damage but they deny it. To resolve the ensuing dispute, a damage committee should be appointed. This committee should consist of administrators and students, and perhaps faculty, and it could be charged with handling situations where students submit that they have been charged un-

fairly. Additionally, this committee could make decisions about assessing charges in situations where an entire group or unit of students is responsible for the damage. Collectively charging students can raise difficult legal questions, as was the case in *State by Lefkowitz* v. *Bel Fior Hotel* (1980). It clearly is preferable to have students involved in the charging process rather than having the process handled solely by a single administrator.

Special Problems Associated with Greek Letter Organizations

The legal relationship between the college or university and Greek letter organizations will depend on specific arrangements between the institution and the organization. In some cases the Greek letter organization will be located in an on-campus residence hall, in which case the relationship between institution and organization would be much the same as that between the institution and residence hall students. In other situations, the Greek letter organization may live in a house on property off-campus, where the relationship between the institution and the organization would be more like that of a club. Still a third possibility is where the organization either leases a house from the campus or builds a house on land leased from the institution. In these cases the relationship is not as distinct as in the first two examples.

Campus Rules

Depending on the relationship between campus and organization, the institution will have to deal with a variety of concerns regarding Greek letter organizations that are similar to those of residence hall students, or students who participate in clubs and other activities. All campus rules that apply to residential students should apply to members of Greek letter organizations, assuming that the organization is located on campus. All rules that apply to clubs and other organizations should apply to Greek letter organizations, assuming they are located off campus.

The kinds of concerns for physical safety and supervision of activities that apply to residential students should apply to Greek houses when located on campuses. Regular safety inspections should be conducted, rules regarding possession and consumption of alcoholic beverages should be enforced, and the general quality of life in the Greek letter house should be addressed with the same vigor as the same question is addressed in the residence hall.

Supervision

On the other hand, while paying close attention to life in Greek houses is a commendable objective, how realistic that approach is may be questioned. Normally, residence halls have staff on every floor or corridor, while there may be no on-site supervision in the Greek house. The problems of dealing with alumni(ae) may be involved, since such individuals often have significant influence with general campus administrators and may try to circumvent efforts to maintain a lifestyle in a Greek house similar to that in the residence halls. If the Greek house is located on private property, the institution's ability to influence life in the house is further diminished; life in the house then becomes less subject to institutional regulations and more subject to local ordinances and state and federal laws. Therefore, the best that the institution might hope for in many cases is to work closely with the student and alumni(ae) leadership to provide as high quality environment as possible. Students should be held accountable for their actions. If they break institutional rules, they should be punished. If they fall behind in payments to the college or university, assuming that is the financial arrangement, alumni(ae) should be involved early so that the financial difficulties can be addressed.

In the final analysis, however, trying to provide as much structure for Greek letter organizations as residence halls is difficult. At best, the student affairs administrator should try to provide an environment where negotiations can be held with the leadership and problems can be solved without great difficulty.

There are two aspects of Greek life, however, that demand

immediate attention and constant vigilence on the part of the student affairs administrator. These aspects include *hazing* and *discrimination*. Each aspect can provide the student affairs administrator with significant problems.

Hazing

Hazing and Greek letter organizations have been synonymous for decades. The traditional hazing of pledges has been a part of house life, and in some instances, the hazing of pledges during "Hell Week" is a highlight for many active members of chapters. Officially, many colleges and universities have outlawed hazing, and in fact, Greek letter organizations themselves have followed suit. That still does not account for an unfortunate incident or two every year where a pledge is severely injured or killed somewhere in the United States as a result of a hazing activity. The institutional response to any reported hazing incident should be swift. If the hazing is verified, the student affairs administrator would be well advised to take definitive action against the organization. That action can range from suspending pledging activities, to limiting social and recreational activities, to withdrawing the organization's charter. Hazing activities cannot be tolerated by the student affairs administrator. The institutional risk is so great that anything other than swift action against those organizations practicing hazing will be insufficient.

Discrimination

Although it may be more subtle, the other special problem associated with Greek letter organizations, that of discrimination, is just as difficult a problem to address as hazing. Whereas a clear case of hazing demands a swift institutional reaction, discrimination may be more difficult to prove other than on a *de facto* basis. While many organizations take the official position that students of any race, creed, or color may pledge, the fact is that many composite pictures from organizations fail to reveal any member from minority groups. This problem is not one which can be solved easily. Quiet diplomacy and constant reminders to the leadership that discrimination is illegal may yield

some results. This issue is a thorny one, for while whites practice discrimination against minorities who wish to join their organizations, members of historically minority Greek organizations likewise may not be anxious to have whites join their groups.

Summary

The residential campus always will provide more risks for student affairs administrators than commuter campuses, simply because students spend the vast preponderance of their time on campus. As a result, administrators must carefully plan policies and procedures that address each of the topics listed above. Many difficult issues have been resolved in the courts, and procedures to address the situations have been mandated. Student affairs administrators would be remiss if they repeat the mistakes that resulted in earlier litigation with unfavorable results. Counsel should be sought if situations have legal overtones.

Although students and parents may threaten legal action if they do not have their way regarding a specific matter, *educational policies should not be sacrificed on the altar of threatened legal action.* Student affairs administrators instead should let their action be guided by good educational practices, relevant case law, sound legal advice, and the concerns and needs of their students.

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CHAPTER FIVE
Rights of Association, Expression, and Publication

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The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. . . ." The Fourteenth Amendment to the Constitution protects these First Amendment guarantees against infringement by state officials. In addition, most, if not all, states have provisions in their constitutions that protect these basic rights.

These First Amendment guarantees are now generally construed to mean freedom of expression and association in many

different forms. Subject to certain exceptions, students have a right to decide for themselves with whom they will associate, formally or informally, and for what purpose. They have the right to express their views and to advocate action to support or alter current laws, rules, policies, or mores. The expression of those views may be the use of student newspapers or by resort to more informal communication methods such as rallies, pamphlets, and petitions.

Freedom of Association

The pathbreaking decision in *Dixon* v. *Alabama State Board of Education* (1961), holding that students should not be required to renounce their constitutional rights to due process in exchange for the privilege of attending a public university, has led to today's commonly accepted notion that students do not shed their constitutional rights to freedom of speech or expression when they enter a public college or university. Although the courts have long recognized the need for affirming the comprehensive authority of the state and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools (*Tinker* v. *Des Moines Independent School District*, 1969), it is also evident that there is no longer any room for the view that First Amendment protections should apply with less force on public college campuses than in the community at large.

One of the most fundamental rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. Although the United States Constitution does not explicitly guarantee freedom of association, this has long been held to be implicit in the freedoms of speech, assembly, and petition (*NAACP* v. *Button*, 1963).

The leading United States Supreme Court decision involving freedom of association is *Healy* v. *James* (1972). That case arose out of a denial by a college president of official recognition to a group of students who had petitioned, under the rules, to form a local chapter of Students for a Democratic Society (SDS).

Although the Student Affairs Committee (composed of students, faculty, and the Dean of Student Affairs) recommended that the application for official recognition of S.D.S. be approved, the president rejected the Committee's recommendation because he believed, among other things, that the organization's philosophy was antithetical to the school's policies. The students filed suit against the university, claiming abridgement of their First Amendment rights.

Even though a court-ordered hearing presided over by the dean of students was unable to determine that the students in S.D.S. contemplated any illegal or disruptive practice, the president reaffirmed his prior decision to deny the students recognition as a campus organization. Although the lower federal courts decided that the students' rights had not been abridged, the United States Supreme Court concluded otherwise. Decided during a period of time where a climate of unrest prevailed on many college campuses, the Court recognized that there were competing interests involved. Its decision in *Healy* required a recognition of "the mutual interests of students, faculty members, and administrators in an environment free from disruptive interference with the educational process" to be balanced with the "equally significant interest in the widest latitude for free expression and debate consonant with the maintenance of order; where these interests appear to compete, the First Amendment . . . strikes the required balance" (p. 171).

Recognizing that freedom of association is one of the rights protected by the First Amendment, the Supreme Court held that denial of official recognition, without justification, to college organizations burdens or abridges that associational right. Students' associational interests are circumscribed by the denial of the use of campus space, bulletin boards, and the school newspaper. If an organization has any hope of surviving on a college campus, it must have the means of communicating with the college community.

"The effect of the College's denial of recognition was a form of prior restraint," stated the Court in *Healy*, and although "a college has a legitimate interest in preventing disruption on the campus, which under circumstances requiring the safeguarding

of that interest may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action" (p. 184). The Supreme Court held that the college had not met that burden and that, in the end analysis, denial of recognition was because of the mere disagreement of the president with the group's philosophy. Because the college did not base its denial of recognition with due attention to First Amendment principles, the denial of recognition was reversed.

The court concluded:

> As repugnant as these views may have been, the mere expression of them would not justify the denial of First Amendment rights, whether petitioners did in fact advocate a philosophy of 'destruction' thus becomes immaterial. The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent. (p. 188)

Control of Homosexual Organizations

The United States Supreme Court's recognition that basic First Amendment values include the fundamental right to meet, discuss current problems, and to advocate changes in the law has been applied most recently to prohibit denial by university administrators of requests by homosexual students to form organizations on campus. *Gay Alliance of Students* v. *Matthews* (1976), and *Gay Lib* v. *University of Missouri* (1977) are examples of such cases.

Not only have public university administrators been prohibited from denying recognition to homosexual organizations, laws aimed at regulating the recognition or registration process have also been held unconstitutional. In 1981, the Florida Legislature passed an appropriations bill that contained language mandating the cut-off of all public funds to any educational institution, state-supported or private, that registered, recognized, or knowingly gave assistance to any group or organization that recommended or advocated sexual relations between people not married to each other. The sponsors of the law publicly admitted that it was aimed at homosexual organizations.

The Florida Supreme Court unanimously held that the law was unconstitutional (*Department of Education* v. *Lewis*, 1982). "Freedom of speech and association," stated the Court, "are protected not only against heavyhanded frontal attack, but also from being stifled by more subtle government interference." (*Lewis*, quoting *Bates* v. *City of Little Rock*, 1960). "The history of the interpretation of the First Amendment shows a steady movement toward protecting the free-speech rights of persons of all political and moral views. Ours is a nation rich in diversity, and our strength has been in our practice of allowing free play in the marketplace of ideas" (*Department of Education* v. *Lewis, 1982).*

Control of Religious Organizations

Although it is safe to say that it is now well-settled law that colleges and universities must not only tolerate but protect the rights of their students to determine with whom they will associate, it is less clear what role state-supported colleges and universities must play in making their facilities available to student organizations desiring to use them for religious worship and religious discussion.

The issue is whether colleges and universities that permit their facilities to be used for purposes of religious worship and religious discussion violate the Establishment Clause of the Constitution of the United States, which provides that, "Congress shall make no law respecting an establishment of religion . . ." (U.S. Const. Amen. I). A recent United States Supreme Court decision, *Widmar* v. *Vincent* (1981), has helped to remove much of this uncertainty. In that case, the University of Missouri at Kansas City refused to permit a student organization to use its facilities for religious worship and discussion. The exclusion was based on a university regulation prohibiting the use of buildings or grounds for purposes of religious worship or religious teaching. The United States Supreme Court held that the university's policy violated the fundamental principle that a state regulation of speech should be content-neutral.

The court in *Widmar* concluded:

> Through its policy of accommodating their meet-

> ings, the university has created a forum generally open for use by student groups. Having done so, the university has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place . . .
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> * * *
>
> Here the University of Missouri has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment. . . . In order to justify discriminatory exclusion from a public forum based on religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. (pp. 273-74)

The Supreme Court held that the open forum policy had a secular purpose, would avoid entanglement with religion, and did not have the "primary effect" of advancing religion, a three-pronged test that must be passed in order to avoid application of the Establishment Clause. In that case, there was no empirical evidence that religious groups would dominate the university's open forum, thereby dispelling any argument that the advancement of religion would be the forum's "primary effect."

Solicitation and proselytization by certain religious sects and cults have presented perplexing problems to student affairs administrators who have received complaints from members of the university community who object to being confronted with such conduct. The leading cases in this area have involved public airports and state fairs, but their logic extends to public colleges and universities. Generally speaking, religious groups and cults cannot be forbidden from entering a public place and from

orally communicating their religious views to others. Only if it can be proven that substantial disorder in a congested area would occur and/or the activity would prevent the protection, safety, and convenience of others, may indiscriminate contact be curtailed by confining such communication to booths or tables (*Heffron* v. *International Society for Krishna Consciousness*, 1981).

Commercial solicitation, however, by such religious groups may be restricted to tables or booths if the rule applies to all solicitors and tradesmen and the method of allocating space is a straightforward first-come, first-served system. Where it can be shown that the orderly movement and control of crowds is a substantial consideration *(Heffron)* or if such a rule is in furtherance of substantial government interests in maintaining the privacy, security, and study environment of its students (*Brush* v. *Pennsylvania State University*, 1980), such restrictions will likely be upheld. Courts have also upheld rules regulating access to "captive audiences" as reasonable time, place, and manner restrictions. However, if members of the audience are fully capable of saying "no" to persons seeking their attention and then walking away, they are not members of a captive audience, even though the contact is not desired and may cause irritation (*Village of Schaumburg* v. *Citizens for a Better Environment*, 1980).

Freedom from Compelled Association

Although the courts have clearly and forcefully enunciated the rights to be accorded to students when they wish to associate, there have been few decisions on the freedom *not* to associate. The leading case on this subject argues in favor of the view that students should not be compelled to be members of any association if that is not their desire.

In *Good* v. *Associated Students of the University of Washington* (1975), the Supreme Court of Washington was called upon to decide whether students at the University of Washington were required to be members of the Associated Students of the University of Washington (ASUW), as provided by that organization's constitution. Students who did not desire to be members

argued that they had a constitutionally protected right not to associate with any group, just as they enjoyed a concommitant right to associate with any group of their choice. The Supreme Court of Washington agreed.

The court in *Good* noted:

> Freedom to associate carries with it a corresponding right to not associate . . .
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> * * *
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> . . . (W)e have no hesitancy in our holding that the state, through the university, may not compel membership in an association, such as the ASUW, which purports to represent *all* the students at the university, including these plaintiffs. That association expends funds for political and economic causes to which the dissenters object and promotes and espouses political, social, and economic philosophies which the dissenters find repugnant to their own views. There is no compulsory support, advocation, and representation. We recognize that First Amendment rights are not absolute, but the University presents no arguments or facts to justify any exception, narrow as it would have to be, which might exist if a compelling state interest were presented.
>
> Thus we hold that the university may not mandate membership of a student in the ASUW (pp. 766-768)

The fact that certain campus activities and programs, such as lectures and student publications, are funded from mandatory activities fees makes it incumbent on a university to insure that viewpoints expressed in those lectures or publications represent a diversity of thought and opinion. Lawsuits challenging the use of mandatory activity fees for uses to which some students object have rarely been successful. Courts have recognized, however, that there is a delicate balance between the rights of the protesting students who disagree with viewpoints being expressed, which they are forced to finance, and the desire of the university to provide a forum for wide-ranging ideas. The decisions in this area have been based on the premise that a

university must provide a wide spectrum of ideas, not a single-track philosophy.

Good reinforced the following established positions:

> Dissenting students should not have the right to veto every event, speech or program with which they disagree. On the other hand, those . . . (charged with the expenditure of the fees are) not totally unchecked on its use of these fees . . . A program cannot become the vehicle for the promotion of one particular viewpoint, political, social, economic, or religious. (p. 754)

The lesson for student personnel administrators is that they should monitor the various existing activity-funded forums for expression on the campus to insure that they are not consistently used for the furtherance of a particualr position. At least one court (*Good*, 1975) has suggested that if certain programming efforts have the effect of imposing the acceptance or practice of religious, political, or personal views repugnant to students or chilling the exercise of their constitutional rights, university administrators may be required to establish a fund from which disenchanted students would be able to recover a portion of their fees.

Freedom to Express Views

If students are free to associate, what are the limits of their ability to express their views to advocate action to support or alter current laws, rules, or other policies?

The courts have generally recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum. According to *Healy* v. *James* (1972), "The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas' " (p. 180). The courts have therefore held that students enjoy First Amendment rights of speech and association on the campus and that the denial of use of campus facilities for meetings and other appropriate purposes must be subjected to the level of scrutiny appropriate to any form of prior restraint.

On the other hand, the United States Supreme Court recognized in *Tinker* (1969) that First Amendment rights must be analyzed in light of the special characteristics of the school environment. The court also in *Widmar* v. *Vincent* (1981) recognized those particular characteristics when it noted:

> A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this court have never denied its authority to impose reasonable regulations compatible with that mission upon the use of its campus facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings. (p. 273)

The general law is that students have the fundamental right to meet, discuss current problems, and to advocate changes in the status quo, so long as there is no incitement to imminent lawless action (*Brandenburg* v. *Ohio,* 1969). According to *Healy* (1972), the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not.

In *Healy* the court further stated:

> In the context of the special characteristics of school environment, the power of the government to prohibit "lawless action" is not limited to acts of a criminal nature. Also prohibitable are actions which "materially and substantially disrupt the work and discipline of the school" . . . Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education. (p. 189)

However, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression (*Tinker,* 1969).

Student personnel administrators are, of course, keenly aware that some students entertain viewpoints that are not shared by others. Unless, then, the advocacy of those viewpoints is directed to inciting or producing imminent lawless action and is likely to incite or produce such action, a university may not forbid the expression of advocacy of those views. A 1982 court decision in Florida is also helpful in providing the philosophical basis for this approach:

> The right of persons to express themselves freely is not limited to statements or views that are acceptable to the majority of the people. If it were to be held that freedom of expression applies only to views that the national, state, or local community finds to be within the range of reasonable discourse, the First Amendment would have little meaning or purpose. . . . The real purpose of the First Amendment is to protect also the expression of the sentiments that the majority finds unacceptable or even unthinkable. The First Amendment even protects the right to express the view that our constitutional form of government should be overthrown by illegal means. (*Department of Education* v. *Lewis*, 1982)

However, the fact that students and student organizations at public institutions of higher learning enjoy the full protection of the First Amendment does not prevent those involved in operating such institutions from maintaining a suitable environment for carrying on the process of learning. In *Healy* (1972), the Supreme Court made it clear that the First Amendment does not require a college or university community to stand idly by while persons or groups engage in conduct that substantially disrupts the functioning or discipline of the school environment. Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education. Valid time, place, and manner restrictions are permitted.

Reasonable restrictions are clearly permitted by the court as expressed in the following:

> Just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech related activities must be respected. A college administration may impose a requirement . . . that a group seeking official recognition confirm in advance its willingness to adhere to reasonable campus law. Such a requirement does not impose an impermissible condition on the students' associational rights. Their freedom to speak out, to assemble, or to petition for changes in school rules is in no sense infringed. It merely constitutes an agreement to conform with reasonable standards respecting conduct. This is a minimal requirement, in the interest of the entire academic community, of any group seeking the privilege of official recognition. . . .
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> . . . (A)ssuming the existence of a valid rule, however, we . . . conclude that the benefits of participation in the internal life of the college community may be denied to any group that reserves the right to violate any valid campus rules with which it disagrees. *(Healy,* pp. 192-194)

Time, place, and manner restrictions may not, however, be based on either the content or subject matter of the speech. In addition, such regulations may not be imposed unless they serve a significant governmental interest.

Commercial Solicitation on Campus

University administrators may enact regulations that prohibit door-to-door canvassing in student residence halls.

In one case, *Brush* v. *Pennsylvania State University* (1980), the Supreme Court of Pennsylvania upheld a state university regulation that prohibited canvassing in the living areas of student resident halls unless undertaken by registered individuals, either invited to a student's room or allowed to canvass as a result of a majority vote by the residents of a given hall to allow "open"

canvassing. To the claim that the regulation was an unconstitutional infringement of First Amendment rights, the Court held that the regulation restricted only time, place, or manner of speech, and thus did not violate the First Amendment. Such restrictions were deemed to be reasonable and in furtherance of substantial university interests in maintaining the privacy, security, and study environment of its students.

In a related case, *American Future Systems, Inc.* v. *Pennsylvania State University* (1980), a federal court held that a state university policy that prohibited sales, demonstrations, and solicitations in the university-owned and operated residence halls was not a violation of the First and Fourteenth Amendments. The Court held that a university could restrict the use of its residence halls to purposes that further the educational function of the university.

Student personnel administrators wishing to restrict solicitation should exercise caution and should carefully substantiate how the educational function will be furthered by implementing a restrictive policy. As an example, the housing contract should stress the importance of the respect for privacy rights, personal security, and the maintenance of an environment conducive to study and reflection. Rules restricting commercial solicitation should be specifically related to these objectives, should be limited to the "common areas" of the residence halls, and the penalties for violations should be included with other similar violations, such as excessive noise and failure to observe visitation hours, so that all conduct that detracts from the desired environment is covered in one place in the contract. It would also be useful to outline in a solicitation policy the means by which this activity may permissibly occur on campus, such as by use of the campus and local newspapers, the mail, and to the extent that it is permissible, by bulletin boards and other communication devices. Formal approval of these rules by residence hall governing boards or other appropriate groups is suggested, and approval is often easy to obtain. If campus rules are devoid of reasonable standards governing the granting or withholding of certain privileges regarding time, manner, and place for individuals to exercise their rights of speech and assembly, the courts

will strike them down (*State* v. *Schmid*, 1980).

In summary, students, then, are free to decide for themselves with whom they will associate, and for what purpose. They have the right to express their views and to advocate action to support or alter current laws, rules, policies, or mores. These rights cannot be abridged unless it can be clearly demonstrated that the exercise of the rights will produce imminent lawless action, will materially and substantially disrupt the work and discipline of the university, infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity or other students to obtain an education.

University officials may, however, require conformance with reasonable standards respecting conduct and adherence to reasonable campus rules and regulations. They may also enact regulations that restrict the time, place, and manner of expression.

Campus Publications

Although a substantial amount of communication of views and expression of opinion occurs during speeches and rallies, and by pamphlets and petitions — communication that is protected by the First Amendment guarantees of speech and association — there is another important method of communication that involves another First Amendment right: student newspapers and freedom of the press.

College students enjoy the same First Amendment protections from governmental interference with freedom of expression as do other citizens; they do not relinquish these rights as a condition precedent to attendance at a public college or university. It has also been noted that expression can lose its First Amendment protection if it materially and substantially interferes with the educational process (*Tinker*, 1969) or if it incites imminent lawless action (*Healy*, 1972). In addition, the media loses its First Amendment protection if it is significantly detrimental to national security or is obscene (*Near* v. *Minnesota*, 1931).

If a public college or university has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment. The principles announced in the *Tinker* and *Healy* cases have been extensively applied to strike down censorship of student publications at state-supported institutions. Censorship of constitutionally protected expression cannot be imposed by suspending the editors, suppressing circulation, requiring approval of controversial articles, excising repugnant materials, withdrawing financial support, or asserting any other forms of censorial oversight based on the university's power of the purse (Trager and Dickerson, 1978).

A leading case in point is *Antonelli* v. *Hammond* (1970). In that case, a Massachusetts law provided for compulsory student activity fees, which were to be expended at the direction of the college president. A portion of those fees funded a student newspaper at Fitchburg State College. The president of the college, after reviewing an article prepared for publication in the newspaper, refused to release funds to pay for future issues of the paper unless all material was approved by him or his representative.

A federal district court held in *Antonelli* that the president's actions at Fitchburg State were unconstitutional. The court held that it was not reasonable to restrict what articles students could write or the thoughts they could express. The court further stated, "It would be inconsistent with basic assumptions of First Amendment freedoms to permit a campus newspaper to be simply a vehicle for ideas the state or college administration deems appropriate" (p. 1337).

The newspaper-related questions often involve attempts at some form of prior restraint. Decisions in several cases have emphasized that prohibiting distribution of student publications because of a disagreement with or dislike of the content is an unconstitutional form of prior restraint (*Bazaar* v. *Fortune*, 1973). Public college and university authorities have a heavy burden of showing justification for the imposition of a prior restraint on expression; the fact that they consider the paper's editorial comment to be abhorrent, contrary to the university's policy, and inconsistent with constitutional and statutory guaran-

tees of equality is not enough (*Joyner* v. *Whiting*, 1973).

While university authorities may enforce reasonable regulations as to the time, place, and manner of speech and its dissemination, any attempt to censor or otherwise control a campus newspaper requires a clear demonstration that the action was not taken because of the content of the newspaper, but was instead a nondiscriminatory regulation of the time, place, or manner of its distribution (*Papish* v. *Board of Curators of the University of Missouri* 1973). Although censorship of constitutionally protected expression is prohibited, this freedom from censorship does not necessarily imply that a college newspaper's facilities are the editor's private domain. For example, college officials are justified in prohibiting racial discrimination in staffing newspapers and accepting advertising, because campus organizations must comply with valid campus regulations (*Joyner* v. *Whiting*, 1973). The appropriate remedy, however, is not a withdrawal of funds that would cause a newspaper to suspend publication, but rather the obtaining of a court order forbidding discrimination.

Are university officials ever permitted to censor a campus publication because of its content?

The Code of the National Council of College Publications Advisors provides that, "(t)he advisor must guide rather than censor. . . . Student journalists must be free to exercise their craft with no restraints beyond the limitations of ethical and legal responsibility in matters of libel, obscenity, and invasions of privacy." Thus that Code would permit restraints by the students, but not censorship by university officials.

The United States Supreme Court would appear to permit censorship in only three narrowly prescribed areas — an imminent threat to national security, obscenity, and incitement to violence — according to rigorous evidentiary standards (*Near* v. *Minnesota*, 1931, p. 697).

The courts have gone so far as to hold that university officials have no right to stop publication of a student publication even though they believed the content violated state law. A federal court has held, as an example, that university officials, even under a cloud of criminal prosecution, cannot justify a violation

of constitutional rights because of the fear of prosecution (*Korn* v. *Elkins*, 1970).

Because of the lack of control and authority by college officials, the most recent court decisions suggest that administrators may be less likely to be held liable for damages that may result from material published in campus publications than was true earlier. This may be true even though the publication may receive support by means of funding from mandatory activity fees, office space, janitorial services, and the like. (See, e.g., *Maazart* v. *State*, 1981. See also Note, Tort Liability of a University for Libelous Material in Student Publications, 71 *Michigan Law Review* 1060, 1973).

Careful administrators should consider the appropriate role and function of publication boards in resolving disputes with student editors. Although these boards have no power to censor material, they can have a very persuasive influence on the campus publication when these boards are comprised of respected editors and reporters of the off-campus media. Faculty in the areas of journalism, mass communications, and law can also be effective in counseling and advising.

Student personnel administrators should select an adviser for the newspaper with care. An effort should also be made to see that the student leadership of the campus newspaper comes from relevant academic disciplines such as journalism and mass communications, because these students are likely to have a greater awareness of professional standards and a personal concern for the quality of the newspaper as a reflection of their personal credentials upon graduation.

Conclusion

Universities are operated by a great number of rules and regulations, both formal and informal. Many of these rules have specific application to conduct of students, which enjoys First Amendment protection. Student personnel administrators should be knowledgeable of the law as it pertains to associational and expression-related rights. Rules and regulations

should be reviewed periodically for conformance to law and for updating in light of recent decisions. All staff also should have in-service training sessions and timely briefings of new developments to keep them current in this important area.

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CHAPTER SIX
Risk Management in Campus Activities Programming

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This chapter will provide the reader with a background for identifying and assessing risks involved in areas of social, cultural, and recreational programming. Utilizing typical situations faced by professionals as examples, it will assist the reader in identifying the risks involved and point out techniques to be utilized in effectively managing risks through sound campus activities programming.

The underlying premise of this chapter is that the primary responsibility of the campus activity staff is to insure that quality social, cultural, and recreational programs, emphasizing developmental opportunities, exist for students. The very nature of these programs is such that risks must be taken if this primary

responsibility of the campus activity staff is to be met. As a result of this, risks cannot be avoided — they can only be managed and balanced against desired outcomes. As Viscott (1979) in his book *Risking* pointed out, "not risking is the surest way of losing. If you do not risk, eventually risk comes to you. There is simply no way of avoiding taking a risk" (p. 20). The old saying "nothing ventured, nothing gained" certainly applies to social, cultural, and recreational programming.

In order to insure a common base of understanding of the meaning of risk management as it is used in this chapter, it is important to establish definitions of these words. *Webster's New World Dictionary* (Guralnik, 1968) defines *risk* as the chance of injury, damage, or loss; a hazard. Risk in this context has the connotation of losing. It can, on the other hand, be related to winning. If one purchases a high-risk corporate bond and the borrower meets the obligation, a higher return on the investment will be received. Therefore, the higher the risk, the higher the potential loss *or* gain. The term *management* is used here when discussing risk management in the same sense that Miller and Prince (1976) used it in *The future of Student Affairs* to describe milieu management. *Management* is the implementation of collaborative efforts to coordinate resources and planning that will establish the most effective climate for growth and development. It is important to point out that management is not meant to be synonymous with control.

Legal Risks

While students are adults and must be treated as such, it is important to point out that the institution by its very nature must establish and accomplish goals for the growth and development of its students. The student's purpose for attending the institution is learning; therefore, the institution must determine a "quality of student life" that will facilitate the accomplishment of its goals. The quality of student life is determined in part by the nature of the programs (curricular and cocurricular) and by the rules and regulations governing student behavior.

The landmark case of *Goldberg* v. *Regents of the University of California* (1967) clarified that the institution may establish fair and nonarbitrary rules and regulations to insure the orderly accomplishment of its goals. The court concluded that in an academic community, greater freedoms and greater restrictions may prevail than in society at large, and the subtle fixing of those limits should in a large measure be left to the educational institution. As stated earlier, more recent court decisions have often defined the relationship between the student and the institution as contractual. Thus the student has become an educational consumer and the institution an educational provider. Both enjoy the basic rights of adults and the resulting constitutional protections. While the standards in *Goldberg* still hold, they must be interpreted in light of this contractual relationship between the institution and its adult educational consumers. The following is a review of some more recent court cases that help clarify some of the legal risks associated with social, cultural, and recreational programming.

Recognition of Student Organizations

As described in an earlier chapter, the courts have held that a university does not have to recognize student groups, but once it decides to recognize some groups, then the same criteria must be applied fairly and equitably to all groups. In *Healy* v. *James* (1972), the *United States Supreme Court identified three criteria upon which nonrecognition could be based. Those criteria are: (1) the group's advocacy of views directed to inciding or producing lawless action; (2) the group's failure to show a willingness to comply with reasonable regulations; and (3) the group's engagement in any lawful or disruptive activities or conduct.* As further clarification, it appears to be proper, with certain stipulated exceptions, to deny recognition to single-sex (*Iron Arrow Honor Society* v. *Schweiker*, 1981) or racially discriminatory organizations. Sex and race quotas on student governing bodies are also improper. It is permissible, however, to establish reasonable grade-point averages and course-load requirements for officers (*Sellman* v. *Baruch College of the City University of New York*, 1979), and to require the names of current officers to be filed with the institution (*Eisen* v. *Regents of the*

University of California, 1969). The requirement of membership lists is, however, not permissible (*Young Americans for Freedom* v. *Gorton*, 1978).

Use of Facilities/Services

In general, the courts have ruled that the use of facilities by student organizations follows the same principle as recognition. It is interesting to note that in the *National Strike Information Center* v. *Brandeis University* (1970) case, the court ruled that the university could determine which facilities or services would be available to student groups. In other words, any facility or service could be denied to all organizations for any reason; however, once a facility or service is available to one group it must be made equally available to all groups.

Until recently, institutions could deny the use of facilities to student groups for religious services; however, in *Widmar* v. *Vincent* (1981), the United States Supreme Court ruled that a university that made its campus facilities available for political, cultural, educational, social, and recreational events was in violation of the First Amendment when it prohibited the use of those facilities for religious services.

Student Activity Fees

Several court cases (*Veed* v. *Schwartzkopf*, 1973; *Good* v. *Associated Students of the University of Washington*, 1975; and *Galda* v. *Bloustein*, 1982) have affirmed that the university may collect and allocate mandatory student activity fees as long as their use does not exceed statutory limitations or become a vehicle for promotion of one particular political, social, economic, or religious viewpoint. The case of *Galda* v. *Bloustein* (1982) is particularly helpful in that it begins to define the parameters where an allocation to an organization may be found to be promoting one particular political viewpoint. In 1981, the United States District Court ruled that an allocation to the New Jersey Public Interest Research Group did not violate first amendment rights of students who objected to this allocation. However, in 1982, on appeal, the United States Court of Appeals, Third Circuit, found that:

> . . . The New Jersey Public Interest Research Group is a political organization whose stance is determined by a student board of directors and the students working for this group are foreclosed from supporting contrary political positions. In addition the court pointed out that in this particular case the University failed to show that the New Jersey Public Interest Research Group had other than an incidental educational component and, therefore, found that the allocation was in violation of the First Amendment to the United States Constitution. The court further pointed out that it did not mean to imply that all mandatory student fees can be invalidated on First Amendment grounds. It distinguished the fee arrangements in this particular case . . . (cited in Young and Gehring, *The College Student and the Courts*, 1977 p. 496)

Thus it is clear that an allocation of a mandatory collected activity fee must be for a purpose that is primarily educational; when the educational purpose is incidental to a partisan political, social, economic, or religious purpose, the courts are likely to rule that the allocation would violate first amendment rights.

Distribution and Sale of Literature

Until quite recently, courts have ruled that university regulations requiring prior approval before literature and other material may be sold on the campus was constitutional. However, a very recent case (*Spartacus, etc.* v. *Board of Trustees of Illinois*, 1980) found these regulations to violate First Amendment rights. The court recognized that the institution may well have a legitimate interest in regulating purely commercial activity, but declared that in this case, regulations went beyond that interest. The court stated that "its restrictions on the sale of literature . . . reached those . . . who may wish to obtain some payment to assist in meeting the costs of publishing the literature they distribute. Solicitation for contribution is, in those circumstances, an incident to the espousal of ideas" (Cited in the *College Student*

and the Courts, 1977, p. 430-31). In this case, the court also ruled that it was illegal to limit the sales and distribution to students, faculty, and staff of the institution. The court, however, did uphold the university's regulation which required that all handouts identify their source. In summary, the courts would appear to still permit the promulgation of reasonable rules of time, place, and manner regarding the sales and distribution of literature. Those regulations, however, may not limit the sale or distribution to members of the university community or may not limit sales based on poor taste unless the material is restricted by local rules for obscenity.

Demonstrations and Mass Gatherings

The earlier cited case of *Goldberg* v. *Regents of the University of California* (1967) clearly supports the University's right to establish reasonable regulations to insure its ability to accomplish its educational mission. However, since regulations regarding demonstrations can affect a student's constitutional right of freedom of speech and assembly, it is no small wonder that this area has been the scene of considerable court action. In reviewing the area of demonstrations and mass gatherings, Young and Gehring (1977) stated that:

> The right of students to express their views through demonstrations and mass gatherings is protected on campus so long as they do not materially disrupt the normal ongoing campus functions, nor interfere with the rights of others, nor engage in the destruction of property. If students plan or participate in lawful demonstrations which subsequently become violent and destructive, then only those who personally engaged in the unlawful conduct may be subject to disciplinary action. Colleges and universities may promulgate and enforce necessary rules regarding the time and location for holding meetings on campus and require that reservations for the use of certain areas be made in advance. (p. V-1)

Off-Campus Speakers

Programs that deal with off-campus speakers also comprise an area fertile for litigation in that the attempt to prohibit speakers can readily violate constitutional guarantees. The case of *Stacy* v. *Williams* (1969) is particularly helpful in that it defined a set of circumstances under which it would be legitimate to deny a request to sponsor an off-campus speaker. Following the guidelines of that court, a request for an off-campus speaker may be denied if it can be determined that a proposed speech will constitute a clear and present danger to the institution's orderly operation by the speaker's advocacy of such actions as: (1) the violent overthrow of the government of the United States, any individual state, or political subdivision therein; (2) the willful damage or destruction, seizure and subversion of the institution's buildings or other property; (3) the forceable disruption or impairment of, or interference with, the institution's regularly scheduled classes or other functions; (4) the physical harm, coercion, intimidation, or other invasion of lawful rights of the institution's officials, faculty members, or students; and (5) other campus disorders of a violent nature. It is clear from the above criteria that to deny a request for a speaker on a public campus based on only expected distasteful content of the speech would be unsuccessful if legally tested.

X-Rated Movies, Avant-Garde Theatrical Productions, and Other Artistic Performances

The courts would no doubt uphold the right of a student organization to program these controversial events if the institution permits other similar noncontroversial events to be held. If the activity, however, could be shown to violate local community standards of good taste, then it could most likely be prohibited. It is usually difficult to determine what the local standards are, let alone whether a proposed event will violate these standards; therein lies a major legal risk.

Open Meetings

The passage of "government in the sunshine" laws in many states has raised concerns for student affairs professionals, es-

pecially those involved with advising student governmental bodies. The principle that courts have followed in this area seems to be that if any university body has been invested with the authority to make final decisions, then its meetings would be required to be open to the public. If, on the other hand, the actions of the body are simply recommendations to a higher authority, then meetings may legitimately be closed to the public. Normally, one would not expect meetings of the campus activity staff to be required to be open to the public unless that staff has been invested with final decision-making authority in an area such as the allocation of activity fees, and a meeting was held for that purpose.

Intramurals and Recreational Activities

The area of intramurals and recreational activities has produced a number of court cases. Unlike the constitutional questions in areas of student organizations, demonstrations, and speakers, cases in this area have tended to be for negligence involving death or bodily harm. Therefore, the doctrine of "standard of care" plays an important function. This doctrine holds that administrators are responsible for action to protect others when dangerous conditions exist (e.g., swimming pool, gymnastics, rock climbing, scuba diving, etc.). Fortunately, in the area of recreational programs, some standards have been developed and are readily available from associations such as The National Intramural and Recreational Sports Association, The Health, Physical Education, Recreation, and Dance Association, The International Red Cross, etc. Where standards have not been developed, the courts have relied on other professionals in the field in question to define "reasonable" standards of care.

The doctrine of "assumption of risk" is also an important guide to professionals in this area. The critical element in the assumption of risk by participants is prior knowledge or awareness of the risk involved and their voluntary assumption of those risks. Courts have generally ruled that participants in sporting activities, for example, can be assumed to have a higher knowledge of risk than the neophyte enrolled in an activity in

order to learn a skill. Thus, it can be assumed that a member of an intramural rugby team who has participated in this activity for some time has voluntarily assumed a much greater risk than a student who has joined the scuba club to learn to scuba dive.

Equipment rental is another source of legal risk, especially in the area of intramural and recreational programming. According to Soule (1981), the institution or professional staff member is likely to be liable for negligence in the rental of equipment if an injury occurs when the equipment is rented under any of the following conditions:

> **1.** The equipment is or is likely to be dangerous for the use for which it is rented (for example, a life jacket in such disrepair that it will not float).
> **2.** The person renting the equipment is not aware of the danger of using the equipment and reasonable care is not exercised to inform the user of the dangerous condition or the facts that make it likely to be dangerous.
> **3.** The institution or the staff member knows, or has reason to know, that the person renting the equipment is incompetent to utilize the equipment (p.26).

Political Risks

Political influences tend to be diverse and often more difficult to assess than legal influences. They arise from the many constituencies who feel that they have a vested interest in the institution and attempt to exert some control over its activities and programs. Since these constituencies tend to hold broadly varying values, they may attempt to influence decisions in different and many times opposite directions. As staff members make decisions, they tend to assess the potency of a particular group's or individual's impact and, in part, justify decisions based on the anticipated approval or disapproval of such groups or individuals (e.g., the president does not like this kind of activity).

The impact of political risks can be seen quite clearly in the programming of the commemorative activities that have been planned at Kent State University since the tragedy that occurred there on May 4, 1970. The impact of political as well as legal risks was quite clear, and the reactions to this event demonstrate clearly the variety of values held by the many constituencies of the university.

The approaches used to plan the annual commemorative activities reflect in many ways the assessment of the political risks by the administration of Kent State University. While the interest and motivation for planning the commemorative activities have always primarily been student initiated, the reactions to the events by other constituencies have been very vocal and direct. In the first years following the May 4, 1970 event, feelings were running very high, and the administration established a committee of faculty, administrators, students, alumni, and community representatives to plan the commemorative activities. As time passed and the feelings of many constituencies subsided, students were permitted an even greater role in determining which activities would be scheduled. Subsequently, the Board of Trustees decided to build an annex to the gymnasium that altered the site where the tragedy occurred. The reaction to this decision is a matter of public record; however, suffice it to say that the reactions and, hence, political risks from all constituencies were again heightened. At this point, a broad-based committee was again constituted to "coordinate" commemorative activities. Currently, the intensity of feelings about this event has again subsided and students are once more the primary initiators of the events.

The following are some of the risks associated with the more common political influences in social, cultural, and recreational programming.

Student Dissatisfaction

One only needs to look at the literature of the 1960s and 1970s to get an overview of the effectiveness of the political influence of students on an institution when decisions were greatly inconsistent with their desires. Obviously, the campus activi-

ty staff cannot always make decisions that are popular with the student body. Furthermore, given the heterogeneity of the student body, nearly all decisions will be unpopular with some portion of the students.

Vocal student dissatisfaction is a particularly potent political risk, as in many cases the dissatisfaction of students causes other constituencies (e.g., parents, faculty, administration, etc.) to focus on the decisions and the decision-making process of the campus activity staff. This, unfortunately, views the social, cultural, and recreational program from a problematic rather than a student developmental perspective, and tends to drain creative staff time away from growth-enhancing activities.

On the other hand, if the dissatisfaction is not expressed in a way that brings about needed change, it is likely to be expressed in increased attrition. Dissatisfaction expressed as attrition is very subtle and likely to go unnoticed by all constituencies.

Parental Dissatisfaction

Parental goals for their son's or daughter's growth and development are many times quite similar to the student developmental goals of the campus activity staff; however, there is not always agreement on the means used to accomplish these goals. The risks of parental dissatisfaction, through either disagreement with or misunderstanding of the means to accomplish developmental goals, are indeed great. One should remember that parents still exert a great deal of influence on their children's decision as to which school to attend and an even greater influence on which schools may be chosen. It should not be assumed that parents are interested solely in the safety and security of their college-aged sons and daughters. While those concerns are basic, parents are also very concerned about the opportunities for students to meet social needs and develop leadership and human relations skills.

Faculty/Administration Disapproval

Although faculty and administration may be viewed quite differently, they are grouped together for this discussion be-

cause the risks involved are quite similar. While the administration may have a more direct impact on the campus activity program and the staff, the wise professional is also keenly aware of the influence of the faculty. Risk with the administration and faculty is most likely to occur when the goals of the campus activity staff are not consistent with those of the faculty and administration or are not understood by those groups. If campus activity goals, and more importantly the means of accomplishing those goals, are not viewed as consistent with those of the university in general, the campus activity program is not likely to be valued, adequately funded, or supported by the faculty and administration.

Alumni Disapproval and Negative Community Relations

In order for an institution to accomplish its mission, a harmonious relationship with the alumni and the local community is highly desirable, if not absolutely necessary. The campus activity staff are frequently involved in making decisions that may strain that relationship.

Public relations risks can be further classified into two general types. The first type results from the value discrepancies between students and the alumni, townspeople, and general public. The students, whose values tend to be more liberal and diverse than the values held by some alumni and members of the community adjoining the institution, may occasionally plan activities or form groups that are distasteful to some members of these groups. The request for recognition of a homosexual or communist student group, or a request to schedule an X-rated movie, are common situations where these differences are likely to be manifested. The second type of public relations risk is a result of the expectation of the public that the institution will continue to behave as though it were *in loco parentis* to the students and censor of distasteful activities. While *in loco parentis* is no longer in effect, the campus activity staff member who simply tells a local business person seeking assistance in collecting an unpaid bill from a student organization that *in loco parentis* is dead and refuses to assist, is not only running the risk that the business person may eliminate services to all student groups but

also may lose the opportunity to teach student leaders a lesson in financial responsibility.

Philosophical Risks

The third area of influence on a staff member's decisions is his or her personal philosophy regarding student development through campus activities. The potential risk involved here is the loss of opportunity to meet social, cultural, and recreational needs of students and to provide realistic opportunities for the development of leadership and human relations skills. This risk, while perhaps more subtle than legal and political risks, has the greatest impact on the campus activity staff. It is no doubt true that more professionals have left the field of campus activities (voluntarily and involuntarily) because they failed to implement a satisfactory program of social, cultural, recreational, and leadership development programs for students than because they failed to manage legal and political risks. Furthermore, there is an increasing body of evidence that the quality of the social, cultural, recreational, and leadership development program has a significant impact on student satisfaction and retention (Astin, 1975).

It would be interesting to research carefully the development of decision-making skills of campus activity staff. It appears to this writer that the beginning staff members who have recently completed their graduate work are the ones most likely to be primarily guided in their decision making by their philosophy. As staff members gain successful experiences and move up in the organization structure of the institution, they often appear to become more sensitized to legal and political pressures. In this process it appears that some staff members either lose sight of or never fully develop their own philosophical base, and as a result they have some difficulty in functioning as leaders among the campus activity staff. The loss of student development opportunity resulting from the campus activity staff member who does not operate from a philosophical base, or operates from an ineffective one, is associated with the finiteness of the

resources upon which rests the successful operation of social, cultural, and recreational programming.

Time

Each activity, each staff meeting, and each conference consumes precious time. Even the most dedicated staff member, student leader, or faculty member must limit the number of hours available for the programming effort. Some planning approaches that require a great deal of time, while perhaps developmental for some students, tend to have the effect of reducing the number of activities that may be made available for all.

Finance

The risk of misusing increasingly scarce financial resources is rapidly becoming the first concern of professionals in both public and private institutions. In most instances, it is already very difficult to develop "new" money to implement programs for unmet needs. Professionals must increasingly determine which of several competing programs are most likely to produce the desired outcomes. The literature on accountability is invaluable in managing financial risks, regardless of whether the concern is with the allocation and use of student activity fees or the management of a departmental budget. Legal abuse of the management of funds will likely result in criminal liability.

Campus Activity Staff Characteristics

Through their own personal values and philosophy, the campus activity staff members, themselves, are a source of risk. They will tend to maximize some risks and minimize others, based on their administrative skills or the lack thereof, and will also determine which risks are encountered. For example, some will be more effective in managing their time and as a result will experience less risk from the pressure of time. Likewise, the staff member who is skilled in soliciting input from the many constituencies at the institution will reduce the political risks stemming from the disapproval of those groups. Obviously, personality characteristics will also determine, to a great degree, which risks are maximized and which are minimized. Staff

members whose personalities allow them to relate effectively with faculty and other administrators can significantly reduce the political risks from those sources.

Special Areas of Risk in Campus Activities

In a framework consistent with the source of risks discussed above, Dr. Milton E. Wilson, Jr. (1974) dean for student affairs at Kent State University, indicated that there are four important questions to be asked when developing programs. These questions, which aid in the identification of risks are:

1. Is the program educationally, developmentally, and philosophically sound?
2. Is the program financially feasible?
3. Is the program politically wise?
4. Is the program legal?

This section will further identify some of the risks associated with two of the most common approaches to programming and in other typical areas of responsibility for campus activity staff.

Approaches to Programming

Professionals in campus activities have the primary responsibility for the quality of the cocurricular life at the institution. This is true both for the quality of social, cultural, and recreational programs available for student participation and the quality of the developmental experiences available to students through program planning and implementation. The attempt to provide both a broad program of activities and a good developmental experience has led to two major approaches to programming. Professionals who want to maximize the quality of cocurricular activities argue that the paid professional staff with greater expertise and experience than students should be responsible for the implementation of social, cultural, and recreational programs, with students playing an advisory and assistant role.

This approach, no doubt, should produce the highest quality program of social, cultural, and recreational activities. On the other hand, professionals who are more concerned about the quality of the developmental experiences argue that in order for students to gain the experience necessary for the development of leadership and human relations skills, they must be held directly accountable for programs. Professionals espousing this approach feel that appropriate institutional standards for programs should be established that will insure an adequate array of activities for student participation. The following are *some* of the considerations involved in each approach:

Approach One (program implemented by staff with students advising and assisting)
1. Reduced opportunity for student development, and
2. Financial (more staff required)
Approach Two (programs planned and implemented by students with staff advising)
1. Less than maximum social, cultural, and recreational programming,
2. Increased legal risks, and
3. Less control over the selection of controversial programs, with potential risk to public relations.

If one's goals are to minimize political and legal risks, it is obvious that the first approach will be implemented. However, if a strong commitment is made to creating developmental opportunities for students, then the second approach will be more desirable. Most institutions and professionals find that a combination of approaches is both more compatible and more effective in accomplishing overall goals. For example, intramural and campus recreation directors typically find that the first approach is more effective for developing and implementing open recreational activities in a recreational center. The developmental opportunities for students can be maximized by using the second approach with the club sports program.

Let us now turn to the identification of risks involved with

some specific programs within campus activities. The areas discussed and the risks identified in each area are not exhaustive but should serve as examples to aid professionals in identifying risks in situations relevant to them.

Allocation of Student Activitity Fees

Decisions regarding the allocation of student activitity fees are most often made by the campus activity staff; a student, faculty, and administrative committee; or a representative body of students. The following are some of the risks identified with each method.

Campus activity staff

1. Staff seen as autocratic,
2. Students deprived of a chance for the growth and satisfaction that results from making allocation,
3. Personal disfavor by various individuals who do not approve of the allocations,
4. Lack of all the necessary input for good decision making, and
5. Possible personal lawsuit by dissatisfied groups.

Student faculty administrative committee

1. Leading the committee requiring time that could be allocated to other tasks,
2. Having to educate committee members regarding allocations,
3. Having to deal with self-interests of factions making up the committee,
4. Leadership on the committee taken by faculty or staff rather than students, and
5. Faculty and staff on the committee tending to make decisions without adequate input.

Representative body of students

1. Increase in legal risks,
2. Increase in risks of negative reaction from faculty, administrators, parents, and members of the commu-

nity as more controversial programs are likely to be funded,
3. Professional staff having only an indirect influence on the nature of the social, cultural, and recreational programming, and
4. Increase in time required to advise the representative body of students.

In summary, as student involvement in the process increases, so do the political risks from groups of older adults (parents, faculty, staff, and community members) as well as legal risks. However, the opportunities for student growth and development also increase. Thus *the dilemma for the campus activity professional is a balancing of the legal and political risks against the opportunities for student development.*

Recognition of Student Organizations

Surely few, if any, institutions have decided against the recognition of all student groups, for reasons too obvious to merit further discussion here. However, as pointed out earlier, the courts will require that once the decision is made to recognize groups, all groups must be treated equally. Even though the Constitution of the United States may require that controversial groups be recognized, one must assume that certain risks will result from the decision to "abide by the law" and recognize those groups. The following is a list of some of the risks that result from the recognition of student groups:

1. Student dissatisfaction when they disagree with the purpose of the group being recognized,
2. Possible injury to students (e.g., sky-diving club),
3. Competition with other student organizations for facilities and other scarce resources,
4. Parental dissatisfaction,
5. Faculty and administrative dissatisfaction,
6. Withdrawal of support from alumni who disapprove of the group being recognized,
7. Community, faculty, and administrative fears of the erosion of established values,

8. Community fears of property damage, and
9. Legal liability if recognition is improperly denied.

Approval of Controversial Events

Since the approval of controversial events (i.e., speakers, movies, etc.) results in similar risks to the recognition of student organizations, readers are referred to the above topic for this discussion.

Risk Management Techniques

By far the most effective risk management technique is simply good professional management. Greenleaf (1978) reminded us that ". . . the student personnel administrator must initiate and encourage the development of programs which will not only assist in meeting the stated goals of the institution and contribute to the development of individual students, but which also will hold up to today's legal interpretations" (p. 40).

Goal Setting

Since effective goal setting is crucial to professional management, it is the first technique to be discussed. It is imperative that the institution's goals for the quality of cocurricular life be clearly articulated. This articulation must include both standards of behavior and specific cocurricular programs that will insure the desired quality of the out-of-class life of students. If all constituencies of the institution do not fully understand specifically the goals that the institution is seeking to accomplish, not only will all of the risks be maximized but staff efficiency and effectiveness will be minimized. Space and time do not permit a complete coverage of this topic; however, it is important to point out that the more specifically the program objectives are stated, the easier it will be to assess the risks involved and manage them.

A word needs to be said for the balance of new against continuing programs in the goals of the campus activity department. In these days of tight budgets, it would be very easy for

the professional in campus activities to take the position of establishing goals that implement only activities previously held. After all, this is surely the way to maximize the number of programs with fewer staff and other resources. Taking this approach, however, assumes a tremendous risk.

Yesterday's programs are sure to be inadequate in meeting social, cultural, and recreational needs of today's students. Surely the failure to meet student needs, which produces high dissatisfaction and high student attrition, will fail to meet most of the objectives of an adequate campus activity program. Therefore, while new programs and events do require more staff time and have a potentially higher risk, they must be implemented if contemporary needs are to be met. In reality, a healthy mix of successful continuing programs along with innovative ones will no doubt provide the best balance for meeting student needs and for effective risk management. Thus, in goal setting and the development of job descriptions, a special effort must be taken to insure that this balance of new and continuing programs exists.

The goal setting process should also produce a set of job descriptions for all staff (administrative, clerical, and student) that clearly define areas of responsibilities and programmatic expectations. Expectations should be expressed in terms that are quantifiable and measurable. Good job descriptions should clarify areas of responsibilities that will serve to reduce the risks resulting from staff members operating outside their official responsibility. At the same time, programmatic expectations should be defined in measurable terms, such that when the job descriptions of all campus activities staff are viewed as a unit, the institution's expectations for the cocurricular life of students should be clear. In addition, the "standards of care" for the safety and security of students participating in programs for which a particular staff member is responsible should be made clear in the respective job description.

Personnel Selection and Development Programs

Clearly, an effective personnel program is also a valuable risk management technique. In the recruitment of campus activ-

ity staff, it is important to select persons whose philosophies regarding approaches to social, cultural, recreational, and leadership programming are complementary to the institution's goals. The choice of the word *complementary* rather than *consistent* was purposeful. An institution made up of staff who all operate by the same philosophy is not likely to develop a very creative learning environment, while strongly opposing philosophies are likely to reduce staff efficiency to an unacceptable level. Likewise, an effectively planned and implemented staff development program provides an excellent opportunity to:

1. Aid in the philosophical development of staff,
2. Clarify the quality of social, cultural, and recreational programs, as well as developmental opportunities desired,
3. Insure that staff are aware of and have the skills to implement the institution's standards of care for safety and security, and
4. Provide in-service workshops for legal updates, time management techniques, stress management, etc.

Advising Student Organizations

Campus activity staff should be committed to creating a practical learning environment for students that reflects the "real world" situation as closely as possible. Frequently, however, the staff tend to shield students from some of the risks that occur. In a sense, this is a return to a type of *in loco parentis* that would appear to be inappropriate in dealing with today's adult students. For example, staff members who know that, if tested, the courts would probably require the institution to approve the scheduling of an X-rated movie, may approve the event without giving the students the opportunity to experience the risk resulting from the disapproval of other constituencies. By "taking the flack" personally for these events, the staff member deprives the students of important developmental opportunities. Frequently, when students experience these risks personally, particularly the disapproval of other constituencies, they choose

not to schedule the event. This writer is aware of several institutions that felt the risks of approving a controversial event (i.e., the showing of *Deep Throat*) were so great that they decided to deny the event, knowing full well that, if taken to court, they would be forced to approve the event. Given this situation, one would expect to find a significant number of court cases dealing with this issue. Since few were found, it appears that when students fully understood the depth of the feeling by others at the institution and the risks involved with scheduling these events, they chose not to pursue the approval through the courts.

Workshops for student leaders are quite common today and provide an excellent opportunity for risk management. Risks that are the current concern of the staff should be considered in designing agendas for these workshops. Social, cultural, recreational, and leadership needs assessment, time management, financial accountability, and assessment of concerns of other campus constituencies would appear to be logical topical sessions.

Staff advisers to fraternities and sororities should not overlook the opportunity to utilize national officers, field representatives, and alumni in reducing risks in fraternity and sorority programming. Too often, these groups are brought into a situation only after a major problem exists. The current trend of fraternities to sponsor all-campus parties where beer is sold has many risks. No doubt an alumnus of a chapter sponsoring such an event, who is also an attorney, would be a valuable asset in helping members of the fraternity understand the legal risks to the fraternity and the officers if the event is not carefully planned and implemented. *Regular* meetings between representatives of the Panhellenic Council, Interfraternity Council, various community service agencies, and community governmental bodies, for the purpose of communicating mutual goals and concerns, will serve to increase cooperation as well as reduce the risks involved. Currently, these meetings are most likely to occur only when there is a problem or in a crisis situation; such circumstances severely limit the chance of understanding each other's goals and the opportunity to work cooperatively.

Public Relations

In the experience of this writer, campus activity staff members have devoted their time almost exclusively to planning and implementing activities for and with students. While this approach has perhaps maximized the social, cultural, and recreational programs available for students, it has also maximized the political risks resulting from misunderstanding and disapproval of other constituencies such as faculty, administrators, parents, alumni, and the community. In this situation, the campus activity staff will frequently find itself attempting to conduct activities that are not supported by other campus constituencies. For example, the campus activity staff may feel that an on-campus picnic with a rock band on the weekend before spring finals is a good way to end the semester's social calendar and reduce the tension of finals. The faculty, the president, and even the residence hall staff, whose objective for that weekend is to create ideal study conditions, are not likely to understand why the picnic was planned for that time, unless careful consultation takes place.

Thus, an effective public relations program is essential for campus activity staff as an aid both in risk management and effective program planning. The staff should establish objectives that will insure the understanding of social, cultural, recreational, and leadership goals by all constituencies of the institution. Staff should seize or create opportunities to address faculty, alumni, parental, and community groups in order to help them understand the goals of the campus activity staff and the parameters (legal, financial, etc.) under which they must operate. Likewise, it is important for the campus activitiy staff to attend the planning meetings of other related administrative departments in order to address the mutual understanding of goals and accomplish cooperative planning and problem solving.

It is also important to involve as many campus constituencies as possible on committees and in staff meetings of the campus activity department. When these constituencies are involved in meetings, it is important to communicate the goals and philosophies of the department. Too frequently, commit-

tees only discuss the pros and cons of a committee recommendation and do not understand how the recommendation fits in with or conflicts with cocurricular programming goals. Likewise, it is very important that student leaders understand the goals of the campus activity staff. When this is done, student leaders usually support the goals, help communicate them, and more importantly make decisions in their own sphere of responsibility that support the goals of the campus activity staff.

Most campus activity staff would prefer not to be interviewed by a reporter for a student or local newspaper doing a story on a controversial event. If the staff member, however, provides a reporter with the sound rationale for the decision and the paper prints that rationale, the newspaper can be a very effective tool for the campus activity staff in gaining the understanding and support of many campus constituencies.

Liability Waivers

Liability waivers have become increasingly popular in institutions of higher learning. These waivers implement the defense of "voluntary assumption of risk" and "due warning." *In order for the defense of voluntary assumption of risk to apply, the person involved in an activity must clearly understand the possible risks and must voluntarily choose to assume those risks. The doctrine of "due warning" holds that it is the responsibility of the institution to warn a participant in an activity, or user of the premises or equipment, of the dangers that are not common knowledge to people of ordinary and reasonable intelligence.* It is important to understand that liability waivers cannot relieve staff or the institution of the responsibility for negligent acts. However, they can be effective in proving that participants were duly warned of the existing danger and freely chose to assume the risk. Obviously, if the release forms identify specific and unusual risks involved in a particular activity and are signed by students of legal age (parents' signature if younger), they are most effective.

Many institutions have developed general liability waivers, sometimes called statements of student responsibility. These statements are usually included in the student handbook or a

similar publication. While these general statements are not as effective as forms that have been signed for a specific purpose, they do serve as evidence that the institution attempted to inform students of the risks involved. An example of such a general statement is the one developed at Kent State University (see Appendix A).

A word of caution is appropriate here. It is both unwise and inefficient to simply require signed liability waiver forms for all activities. The courts have indicated that a warning of danger is necessary only when the risks are not common knowledge to all participants. For example, a liability waiver for a trip by student leaders to another institution to discuss ideas with students at that institution may not be necessary and may be a waste of both student and staff time; the time may be far better spent checking to insure that the driver has a safe driving record and proper insurance. Even more important, the time could be spent assisting in the development of an agenda of topics to be discussed at the meeting and the strategies to be used for accomplishing the task. On the other hand, a release form identifying risks of scuba diving in the ocean for a group of students who have only experienced scuba diving in the institution's pool would appear to be valuable. Accepted standards of care for diving in the ocean should provide a guide not only for the development of the release form, but also for the planning of the event. Certainly, if the campus activity staff has access to an attorney, counsel's review of the release form would be valuable.

Common Adventure

Outdoor recreational programming, such as mountain climbing, canoeing, scuba diving, sailing, etc., not only provides great opportunity for student satisfaction and development, but is also laden with risks. The concept of the *common adventure* is a planning method utilized by staff responsible for recreational programs that maximizes the opportunity for student growth and at the same time minimizes the risk for all participants, including the professional staff involved. Legally, this concept is sometimes referred to as a joint venture or joint enterprise.

An important case in this area is *Ruth* v. *Hutchinson Gas Company* (1941). In this case, five men joined together in agreeing to equally share the planning, operation, and all expenses of a trip. One of the men arranged to have his employer, Hutchinson Gas Company, install a gas heater in a camper. The man who had the heater installed was warned that it was very important to keep a vent in the roof open to insure proper ventilation.

On the first night out, the vent was closed for some reason. Four of the men died and the fifth was seriously injured as a result of carbon monoxide poisoning. The court found that this was indeed a joint enterprise where all parties had a community of interest in the purpose and objects of the undertaking, and equal responsibility for its control and management. Since this was a joint enterprise, the warning to one man was equally applicable to all, and the negligence of one was equally attributable to all. Hence, each participant was equally negligent for the closed ventilator, and since the gas company had warned one man of the dangers, that warning was equally applicable to all. Therefore, under the concepts of the common adventure, no one participant or his/her heirs could hold participants liable for acts of negligence. As an aid in determining if the conditions for a common adventure exist, Soule (1981) suggested the following criteria:

> **1.** Equal payment by all members for the cost of the activity (i.e., activity fees cannot be used to offset part of the cost),
> **2.** Equal responsibility for the control and maintenance of all equipment,
> **3.** Equal position and status among members; the absence of any relationship such as teacher-student, guide-tourists, etc.,
> **4.** Equal understanding of what risks are to be faced in the common adventure, and
> **5.** Equal understanding that one member of the outing may not hold another liable, on a common negligence theory (p. 18-19).

The greatest advantage of the common adventure approach to planning activities seems to lie in the environment it creates for student development. Providing students the opportunity to be equally responsible for the costs, planning, and implementation of an activity is a very realistic and effective learning experience. The legal risks for staff will not be reduced, however, unless the above criteria are carefully met.

Consultation with an Attorney

When a professional is considering legal risk, consultation with an attorney is valuable. However, the approach utilized in consultation is critical if the professional is to weigh equally all risks involved in a particular program. It is important to remember that an attorney is normally trained in depth in the area of legal risk, but may have only very limited appreciation of risks in other areas. Therefore, the attorney should not be asked to suggest a way to implement a program unless he/she is also a trained program specialist. Instead, the campus activity staff members should plan the program that they feel should be planned prior to asking the attorney what legal risks are involved; counsel can then better advise the staff member. Only after all risks involved have been assessed, including legal risks, can the campus activity staff make the judgment regarding whether the program should actually be implemented.

Contract Signing

Professionals in campus activities are frequently responsible for advising student groups who are negotiating contracts with outside vendors. These contracts may involve anything from a trip to Florida over the spring break to a speaker or a major rock concert. In addition to the terms of the contract, two points are important to keep in mind in signing contracts. The first is that only the person specifically delegated the authority to sign contracts should sign them, thus avoiding the likelihood of anyone being held *personally* liable for the terms of the contract. Second, a staff member should always include his or her title when signing the contract. In addition, it is wise for the staff member to add — "for [insert name of the institution]" as part of

the signature block. This indicates clearly that the staff member is signing as an agent of the institution and not personally.

Risk Sharing/Risk Transfer

The common method of risk sharing/risk transferring is the purchase of personal liability insurance in addition to any institutional insurance. As mentioned by Buchanan (1981), the monetary liabilities that result from death, personal injury, or property damage suits can be more effectively insured against than can liabilities that result from civil rights suits, particularly where punitive damages are involved. It should be pointed out that obtaining insurance can and probably will increase both the likelihood of being sued and the amount of damages assessed if guilt is determined. On the other hand, most professionals are not in a position to assume the catastrophic financial settlements that may be assigned. At the present time, the cost of this type of insurance is quite reasonable, and it appears to be a wise investment against financial loss for legal liability. In fact, given the financial impact of legal liability, adequate insurance against these risks is necessary in order for staff to be willing to give proper consideration to other risks.

Summary

In summary, the premise of this chapter is that the campus activity staff has a primary responsibility to insure that a quality social, cultural, and recreational program is developed and implemented to meet student needs. In addition, the program of cocurricular activities should be designed in such a way as to provide maximum opportunities for developing leadership and human relations skills. As staff carry out these responsibilities, a number of risks are bound to occur. Risks cannot be eliminated, they can only be identified, weighed, and managed.

Good professional management, including goal setting, the development of job descriptions, and an effective personnel development program are the most effective general risk management techniques. Other risk management techniques include

better approaches to advising student organizations, the means to improve public relations, use of liability waivers, consultation with an attorney, correct signing of programs contracts, use of common adventure trips, and finally, purchasing professional liability insurance.

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APPENDIX A

(Sample Statement)

Kent State University

Student Responsibility

Kent State University attempts to provide realistic learning and program environments for all students. You may be required to participate in observation and/or "hands-on" experiences either on or away from your campus, consistent with your field of study. As a student attending Kent State University, you assume the risks and responsibilities inherent in the educational process.

Observation and/or application experiences may at times involved unique dangers and hazards to which professionals in the field may be exposed, along with the normal risks of functioning in American society. While the University can assume no responsibility for any of these risks, the University attempts to provide a safe environment for its students and to instruct them in safe practices and procedures. Historically, few students have been injured while participating in program-related activities, yet none of us is immune to injury in the course of our daily lives, work, or field of study. Each student should conduct himself/herself using due and reasonable care in his/her actions.

If a particular off-campus experience is a course or degree requirement, you are under no less of an obligation to decide

whether or not to participate and expose yourself to its dangers and hazards than if you voluntarily elect to participate. However, if you choose not to participate in a required activity, you may fail to satisfy the requirements for a given course, and if the course is a degree requirement, for the given degree. Thus, the choice not to participate may then involve, ultimately, changing majors or field of study.

You may wish to discuss the risks and liabilities noted above with the faculty supervisor of the activity in which you may be participating.

CHAPTER SEVEN
To Risk or Not to Risk: That Is the Question

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The educational process produces growth through both success and failure. The prize for success and the penalty for failure can vary considerably from institution to institution and from situation to situation. It is within this environment that the student personnel professional must draw the educational benefits from a variety of risks. When the decision is to proceed and provide students the opportunity to fail as well as succeed, the concept of risk management becomes paramount in the intensive and interactive environment of a college or university.

It is important to note that there is no way to remove risk or liability from student affairs activities, nor should we try. The use of risk management techniques is simply a process whereby the student affairs professional can more effectively manage the risk and mitigate the area and scope of liability that he or she accepts. The concept of risk management includes both finan-

cial management and the use of physical and human engineering techniques. These techniques are used to isolate areas of risks in programs and facilities and to appraise the cost of the reduction of those risks.

The Changing Legal Environment

While many of the learning experiences that take place in our educational environment use well known procedures that are easily controlled, student personnel administrators, with their emphasis on innovation and personal development, work in an area of special risk that underlines the need for balanced training and supervision. This need for risk management has been reinforced by the increased willingness of the courts and student consumers to expand the concept of malpractice since 1950. The multiplication of malpractice principles has led to greater scrutiny of professionals in terms of individual responsibility and action. Strict standards of care that have been used previously to determine gross negligence are now applied in ordinary negligence situations where the exercise of one's discretion and judgment are involved. Increasingly, judges and juries have been holding the physician, teacher, researcher, and student personnel administrator responsible for financial damages resulting from their actions or inactions. This new form of accountability extends from bodily injury to loss of earning power. The extension of these principles to the student affairs areas in effect applies the legal doctrine of the "prudent and reasonable man" to all areas of our services

Tort liability cases and settlements of claim for both alleged bodily injury and personal injury have grown out of proportion in recent years. One measure of the magnitude of this change is the rise in the net cost of property insurance, which prior to the 1950s represented less than .01 of 1 percent of an institution's budget for fairly broad coverage. Today it is not unusual to find institutional insurance running 1.5 percent of the budget and many institutions also entering into self-insurance agreements. This increase is, in part, because student affairs staff and other

employees of colleges and universities perform their professional functions by implication, if not explicitly, under the direction of an enrollment contract. Financial responsibility for staff members' actions or inactions rests with the institution as well as the individual. Clearly, our institutions must take steps to protect their interest with respect to such liabilities. To accomplish this risk management protection requires appropriate personnel selection, clear-cut directions and procedures for activities to be undertaken, appropriate consumer information on all programs and services, and realistic assessment of the potential risks of all sponsored programs.

Student and Institutional Responsibilities

Before an institution can take the necessary steps to protect its interests with respect to contract liabilities, tort liabilities, or fiduciary liabilities, there needs to be a general understanding of the institution's responsibilities and the student consumer's responsibilities. In *Bradshaw* v. *Rawlings* (1979) the court addressed this question by stating that "at the risk of oversimplification, a change has occurred because society considers the modern college student an adult, and not a child of tender years." The court went on to observe in this case that "because the circumstances show that the students have reached the age of majority and are capable of *protecting their own self-interests*, we believe that the decision should be different. We conclude, therefore, that in order to ascertain whether a specific *duty of care* can be extended from Delaware Valley College to its injured students, we must first identify and assess the competing individual and social interests associated with the parties."

Because of this appellate decision, it is clear that there is no *duty to control* the conduct of a student by an institution so as to prevent him or her from causing physical harm to another, based upon the special contractual relationships existing between the student consumer and the institution. It had been predicted that the Pennsylvania courts would not hold that, by

promulgating regulations, the college had voluntarily taken custody of student Bradshaw so as to deprive him of his normal responsibility of self-protection or to subject him to association with persons likely to cause him harm. Bradshaw's primary contention in his case was that the college acknowledged that (1) its students did drink beer at the public picnic, (2) that this conduct violated a published school regulation and state law, (3) that it created a known probability of harm to a third person, and (4) that knowledge by the college of this probable harm imposed the duty on the college either to control Rawlings' conduct or to better protect Bradshaw from possible harm.

What then is the college's responsibility to its student consumer? As Prosser (1964) has emphasized, the concern that there is or is not a duty begs the essential question — whether the student consumer's interest is entitled to legal protection against the institution's conduct or misconduct. The court in *Bradshaw* ruled that the duty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy that lead the law to say that a particular student consumer is entitled to a particular kind of protection.

Under the enrollment contract in *Bradshaw*, it is clear that we must perceive duty simply as an obligation on the part of the institution to which the law will give recognition and as an order that requires one person to conform to a particular standard of conduct with respect to another person. The court concluded in *Bradshaw* that the "modern American college is not an insurer of safety of its students. Whatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrators and faculties has been required to yield to the expanding rights and privileges of their students." By constitutional amendment (United States Constitution 26th Amendment), written and unwritten laws, case law (*Goss* v. *Lopez* 1975; *Papish* v. *Board of Curators, University of Missouri*, 1973; and *Healy* v. *James*, 1972), and through the evolution of new customs, many rights and responsibilities formerly possessed by college administrators, faculty, and staff have been transferred to student consumers.

An example of the application of this line of reasoning on

the college campus is represented by the recent decision in the case of *Baldwin* v. *Zoradi* (1981). This case was based on several allegations; among those was Baldwin's contention that the dormitory resident assistants knowingly permitted the possession and consumption of alcoholic beverages in violation of the housing contract, and this failure to perform their duty to enforce the rules caused a dangerous condition to exist. She also alleged that by failing to enforce the rules or warn students of the hazard, the defendants "caused" to be furnished alcoholic beverages to persons under the legal drinking age.

The legal question in the *Baldwin* case was simple. Was California Polytechnic State University or its resident assistants liable for the injuries sustained by Baldwin, who was involved in an automobile accident after heavy drinking in a residence hall, when the resident assistants were generally aware that drinking took place in the dormitories in violation of the residence hall contract? The court found that two of the plaintiffs' complaints were based upon the University's failure to enforce the rules. This failure to act is "nonfeasance" as opposed to "misfeasance" or taking improper action. The court noted that in a case of action based upon nonfeasance, liability could only attach to the University if it had a "special relationship" to the student consumer.

In *Baldwin*, the court explored at length the question of whether such a "special relationship" existed which would have imposed upon the University the duty to take action to prevent the injury sustained by Baldwin in the automobile accident. In other instances where one individual created a dependency on the part of the injured individual, the courts have found a "special relationship" to exist. For example, the relationship between a therapist and a client with dangerous propensities created a duty to act on the part of the therapist. However, in this case the court could not find that the residence hall contract upon which the student relied formed the basis for the existence of a "special relationship." The court concluded that "we have difficulty finding that the contract created the type of dependent relationship that was found in cases involving police officers, physicians, or in the dangerously mentally ill cases . . . which

would impose a duty to control alcohol intake by students."

The court further held that even when such a "special relationship" exists, the harm must be "foreseeable" and "the risk of the harm significantly high and the amount of activity needed to protect against harm significantly low, to bring the duty into existence." Referring specifically to the *Bradshaw* decision, the court found absence of other elements necessary to create a duty, and concluded that applying those factors did not support a rule establishing a "duty to control" or a "duty of care" under the facts of this case.

It is clear from analyzing these two cases from different parts of our country that our student consumers have the responsibility of protecting their own self-interest, and that there may be some "duty to care" even where there is no "duty to control." The importance of that conclusion has monumental impact on the risk management planning of colleges and universities and their student personnel staff.

Major Risks In Student Affairs Program

Now that there is a common understanding of our professional liability from the earlier chapters and a basic understanding of our institutional duties to care but not to control, let's look briefly at the major causes of risk in student affairs programs. A review of the case law involved in our professional area clearly indicates four major causes for litigation. The first cause is the general *failure to give adequate instructions*. This inadequacy runs from the general failure of our institutions to clearly define the services or courses they are offering in their brochures and catalogs distributed to student consumers, to the inadequate job descriptions that many of our student affairs professionals are provided.

The terms of the enrollment contract arises out of both oral and written elements, as defined by *Zumbrum* v. *The University of Southern California* (1972). This theory assumes that the student and the institution are parties to a contract, each given certain benefits and obligations. In advertising, the institution seeks

students, and in extending admission, makes an offer to the student; the student accepts by registering. The student agrees to pay tuition and fees, and the college agrees to provide instruction as described and delineated in its publications and to grant the appropriate degree if the student remains in good standing academically and abides by the institution's reasonable rules and regulations. This definition of the student/institutional relationship extends to both public and private institutions and was first offered in *Booker* v. *Grand Rapids Medical College* (1909). But from that point until the 1960s, the courts were reluctant to apply the contract rule regularly because of the "minor status" of the students (*Kaufman* v. *American Youth Hostel, Inc.*, 1958, and *Ryan* v. *Holstra University*, 1971). With the change in the age of majority and the age of entering into contracts, this judicial reluctance has totally disappeared (Hammond & Shaffer, 1978).

One court even got poetic and concluded that "the institution led the plaintiff (student consumer) down the primrose path, and left her out in the cold at the end of the path without the sweet smell of primrose to comfort her." One cannot overemphasize the importance of delivery on services that are advertised or promised in admission materials, and on courses that are offered, described, and sometimes required in catalogs or brochures. An adequate job description is equally important because it becomes the foundation for determining failure or success, nonfeasance or misfeasance, or success in performing one's job honestly, in good faith, and with a reasonable amount of diligent care.

The second major cause of risk is *improper supervision*. Because of the legal liability that is transmitted to a supervisor by an employee under the concept of *respondeat superior*, the actions of employees are critical. Under this legal concept the courts in almost every situation are holding superiors responsible for the actions or inactions of those individuals who report to them in either a line or a staff relationship, if those actions or inactions have caused harm. This fact of our current management environment makes proper supervision extremely necessary.

The importance of this element is underlined by the need for student personnel administrators to provide only such serv-

ices and programs as can be offered within the required reasonable standards of care. These standards of care vary from event to event, from program to program, and from activity to activity. But in all cases there are minimum standards that, if provided, will reduce significantly the risk of the activity. These minimum standards can be found through associations related to the activity (e.g., American Boxing Association, National Burling Association, National Collegiate Athletic Association) or through materials supplied by the manufacturer of equipment used in the activity). A great number of potential liability problems can be alleviated through proper attention to reasonable standards of care by correct supervision of activities.

The third major cause of risk in our profession rests with the *lack of proper inspection of facilities*. Many accidents occur on our college campuses because of faulty or inadequate facilities. Some professionals believe that if they did not intend harm to occur there is no liability. That is just not true. Negligence, or the creation of unintentional harm or damages, carries with it the same degree of liability as an intentional tort. A regularly planned and thought-through inspection of facilities will identify problems long before they become the source of liability. The attention that a student affairs professional commits to this area is an excellent investment in proper risk management. This is especially true if one's job description includes responsibility for facilities.

Last, the *failure of individuals responsible for student problems to consider the characteristics and limitations of the participants in the various activities is a major cause of risk*. Consider for a moment our fraternity and sorority systems and some of the assumptions made regarding their ability to properly manage corporations, facilities, and numerous student activities without a careful analysis of their limitations and the types of assistance that are necessary for success. Unfortunately, very few faculty advisors to these and other groups understand the full scope of their liability and responsibility. If they did understand, I strongly believe that they would act in an extremely proactive manner to shore up or reinforce areas of weakness in the programs for which they are responsible.

Unfortunately, many professionals and students alike have grown confused as to the meaning of two very important words and concepts . . . equity and equality. Those two words do not mean the same. We should not be trapped into a *modus operandi* that requires us to treat all students exactly alike when it is realized that all students are not the same. One should not be afraid to provide additional assistance to some student groups and at the same time greater degrees of freedom to others. The process of growth and human development is based upon a synergistic experience that cannot be prescribed for masses but that should be tailor-made to the individual or to the individual group. This creates a need for involvement, an involvement that unfortunately is not present in many of our activities and programs on most college campuses in the 1980s.

Development of a Risk Management Plan

It does not take one long to become very concerned about the areas of liability that have been studied in this monograph or the major causes of risk that have been reviewed. All of this concern and understanding, it is hoped, will lead more and more student personnel professionals to consider the development of risk management plans. A good risk management plan can significantly improve the delivery of services and at the same time manage the liabilities those services bring to the campus.

A good risk management plan has three integral and important elements. The first is the *risk management policy* itself. This policy statement should be developed and approved by the president and/or the board of trustees. Second, a good statement not only outlines the institution's risk management program but also discusses the interrelationship of the *institution's insurance program and the professional coverage* each employee should carry. The National Association of College and University Business Officers, in its publication entitled *Risk Management and Insurance* by John F. Adams, provides some sample plans that have been adopted by colleges and universities around the country. The reading of this publication is a good place to start in the development of such a policy statement.

The third and last element of a good risk management plan is a *thorough analysis of the various alternatives* that are available in student activity areas of high legality. Each student affairs office must recognize the liability that is part of every staff member's responsibilities. The assumption of risk may be an essential part of the cost of an educational activity.

Cognizance of risk reduction or elimination through the clarification of the scope or mission of our programs is also very important. It may be that the educational or developmental benefits produced by some of the programs are not worth the risks that attend some of the services offered. If this is the case, programmatic decisions need to be made to protect the institution's interest.

The two most common alternatives to assuming risk for a program or activity of extremely high liability is the purchase of insurance or the assumption of a position of self-insurance. The purchase of insurance is by far the most popular solution to the liability problem. Many institutions budget for specific risks, thereby assuming the role of a self-insured institution. This alternative is also acceptable and works well in many areas of institutional liability. Regardless of which action is taken, it is imperative that a conscious decision be made and that this decision be a critical element of the institution's risk management plan.

A number of institutions and student affairs staff members, when considering proper forms of protection, fall prey to the belief that the doctrine of sovereign immunity provides them an exemption. The major problem in this line of reasoning is that the application of the doctrine itself has diminished significantly, almost to the point of nonexistence. To understand the effect of sovereign immunity on trustees, administrators, staff members, and other employees of postsecondary education, one must return to the beginning of Roman law and the basic principle that a person who has suffered a loss by government ill-action or inaction could not recover the loss in a court of law. This doctrine was originally founded on the concept of the "Divine Right of Kings," that the king can do no wrong. Although the United States has forsaken the rule of kings and queens for much of its history, until the last ten years it has never felt an

obligation to break away from this legal concept. To what degree this doctrine, which shields various governmental units from liability, acts also to shield governmental agents such as officials, staff members, administrators, or other employees of an institution of postsecondary education, is an interesting question. The number of cases involving administrators and institutions where plaintiffs have been successful against a defense of sovereign immunity leads one to conclude that the doctine cannot be relied upon with any degree of confidence. There is a growing tendency for the courts to skirt the doctrine by permitting relief normally against governmental officials in their individual capacity.

The theory relied upon here states that a government official is acting outside the scope of his/her authority or discretion when he or she commits a wrongful act. In the recent case of *Kristein* v. *Rictor and Visitors of the University of Virginia* (1970), the court indicated that common law may provide some limited immunity from damages for trustees and top level administrators of state institutions who act wrongfully or even unconstitutionally, where they did so in unquestionably good faith and in perfect accord with long-standing legal principles. This new interpretation provides some limited protection in cases where one's duties were performed honestly, in good faith, and with a reasonable amount of diligent care.

Summary

It is obvious that student affairs professionals will continue to face considerable legal risks in their professional activity. Knowledge of student and institutional responsibilities, an identification of major risks in the student affairs areas, and the development of a risk management plan are essential for effective performance.

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